TABLE OF CONTENTS

	PAGE
INION BELOW	1
RISDICTION	1
E STATUTE INVOLVED	2
MMARY STATEMENT OF THE CASE AND OF APPELANTS' PRIMARY CONTENTIONS	5
E LIVESTOCK MARKET AGENCIES INVOLVED IN HE ADMINISTRATIVE PROCEEDINGS AND IN THESE UDICIAL PROCEEDINGS	11
TURE OF THE SERVICES PERFORMED	15
LATION OF RATES TO VALUE OF SERVICES	28
SONAL AND OTHER VARIATIONS	29
E FINDINGS AND ORDER OF THE SECRETARY	31
FECT OF THE RATES PRESCRIBED	37
ECIFICATION OF ERRORS	42
MMARY OF ARGUMENT	46

RGUMENT

POINT I—The ruinous effect of the rates upon the business of the appellants, severally and collectively, demonstrates that the order is arbitrary or confiscatory or both and should be set aside irrespective of the propriety of allowances for particular components of the rate 48

1. The ruinous and confiscatory character of the rates is properly pleaded individually and with particularity as to each appellant and in effect conceded by appellee's answer 48

PAGE

2. There is no finding either by the Secretary or by the court that the rates would not be confiscatory or would be compensatory as to any appellant; and the court below has in substance found that they are confiscatory 51

3. The ruinous and confiscatory effect of the rates as to all of the appellants, severally and collectively, is established by all of the evidence of record upon the point, which is undisputed 52

   A. Aggregate net owners return on basis of prescribed rates to 61 firms doing business in 1931 53

   B. Return on basis of prescribed rates to the 11 firms doing 50% of the selling business 54

   C. Effect of prescribed rates on revenues of 23 firms doing more than 75% of the business and securing more than 75% of the total market revenue 55

   D. Individual net owner return on basis of prescribed rates 55

4. The evidence in the record as to the ruinous and confiscatory effect of the challenged rates has been confirmed by the event 61

5. Yield of the rates as shown by the evidence in this record is in decided contrast to the yield of the rates as shown in the *Tagg* case by similar evidence in that record..... 64

6. The order should be enjoined because confiscatory 70

7. Order not based on any evidence of waste or inefficiency in the conduct of the business upon a competitive basis 70

PAGE

8. The ruinous and confiscatory effect of the rates as to each and all appellants requires that the order be enjoined without reference to the propriety of the allowances for particular components of the rate 73

9. The inescapably confiscatory effect of the order requires reversal of the decree below with directions to enjoin the order, whatever the theory upon which based and whatever the scope of judicial review thereof..... 75

POINT II—The order is arbitrary and based upon a misconception of the powers and duties of the Secretary, upon a departure from settled and recognized standards, both of reasonableness and of administrative authority, and upon an interpretation of the powers of the Secretary which, if correct, would give rise to a serious constitutional question as to its validity, which should be avoided... 81

1. In making the order the Secretary departed from all recognized and established standards of reasonableness in effect at the time of the passage of the Act. 84

2. The order is based upon an erroneous conception of the Secretary's powers and duties and upon an interpretation of the Act which it would seem would render the Act unconstitutional or at least give rise to a serious question as to its constitutionality 91

POINT III—The findings and order contain no legally sufficient finding that the existing rates are unreasonably high 102

PAGE

POINT IV—The Secretary's allowance for salesmen's services is based wholly on speculation and hypothesis, is arbitrary and capricious, unsupported by evidence, and based upon an erroneous conception of the law and of the Secretary's powers 105

The Secretary's allowances or findings of so-called reasonable cost 105

1. The salesmanship allowance on cattle is based on a purely hypothetical standard, unsupported by and at variance with actual experience.... 108

2. The opinion evidence which alone is relied on by the Secretary in estimating reasonable salesmanship performance, if entitled to any weight at all, is thoroughly inadequate to justify the arbitrary discarding of all actual performance 119

3. The Secretary completely disregarded uncontradicted evidence of numerous uncontrollable and variable factors affecting salesmanship performance 125

4. In determining so-called reasonable cost of salesmanship the Secretary acted arbitrarily, without evidence, failed to follow the principle applied in the Tagg Brothers case and applied a standard at variance with the purposes and objects of the Act 130

5. The salesmanship allowance on hogs and sheep is also based on the adoption of a hypothetical standard, arbitrary and below cost 135

POINT V—The allowance for business-getting and maintaining expense is based upon speculation and hypothesis, is arbitrary and capricious, and is not supported by evidence or finding 139

PAGE

POINT VI—The allowances and findings for yarding and office salary costs are invalid because based upon arbitrary, unsound and capricious functional cost allocations 149

1. The functional cost tables upon which the allowances purport to be based are wholly at variance with the costs as ascertained and reported by the Government accountants .. 149
2. These functional cost tables upon which the Secretary's allowances purport to be based are not supported by other cost evidence in the record, but are figures unrelated to any true functional cost allocation 152
3. Such manipulation of the cost evidence presents a false impression of functional cost variations between individual agencies 155
4. The supposed cost tables comprising the Secretary's evidentiary findings being the whole of the evidence supporting the ultimate findings, and being themselves incompetent, the ultimate findings are void 157

POINT VII—The administrative proceedings were irregular, not in conformity with the statute, and denied appellants due process 158

APPENDIX A

1. Affidavits on behalf of certain petitioners herein, no longer conducting business, filed with the Clerk of this Court i
2. Affidavit of A. L. Arnold, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri viii

APPENDIX B—Schedule indicating average performance per salesman by firms—year 1931.

APPENDIX C—Analysis of Government's Exhibit 115-B.

TABLE OF CASES CITED

PAGE

The "Abbotsford", 98 U. S. 440 85
Aetna Insurance Co. v. *Hyde*, 275 U. S. 440 49
Atlantic Coast Line R. R. v. *Standard Oil Co.*, 275 U. S. 257 100

Beaumont, S. L. & W. Ry. v. *United States*, 282 U. S. 74 ..... 50, 82, 102
Blodgett v. *Holden*, 275 U. S. 142 99
Bluefield Water Works & Improv. Co. v. *Public Service*, 262 U. S. 679 79
Board of Public Utility Commissioners v. *New York Telephone Co.*, 271 U. S. 23 70
Brewster v. *Gage*, 280 U. S. 327 85

Chicago, R. I. & P. R. Co. v. *United States*, 284 U. S. 80 79
City of Spokane v. *N. P. Ry. Co.*, 15 I. C. C. 376 88
Crowell v. *Benson*, 285 U. S. 22 ..... 52, 79, 99, 156, 163

Dakota County v. *Glidden*, 113 U. S. 222 14
Dayton Power & Light Co. v. *Public Utilities Comm.*, 292 U. S. 290 74

Eastern Rate Case, 20 I. C. C. 243 ..... 86, 87
Ex parte Tsuie Shee, 218 Fed. 256 159

Fairmont Creamery v. *Minnesota*, 274 U. S. 1 99
Florida v. *United States*, 282 U. S. 194 ..... 82, 102

Groesbeck v. *Duluth S. S. & A. R. Co.*, 250 U. S. 607 14

Illinois Central R. Co. v. *State Public Utilities Comm.*, 247 U. S. 493 102

PAGE

International News Service v. *Associated Press*, 248 U. S. 215 ..... 76, 96
Interstate Commerce Commission v. *Louisville & Nashville Railroad*, 227 U. S. 88 ..... 102, 156, 162, 163
Interstate Commerce Commission v. *Northern Pacific Railway*, 216 U. S. 538 102
Interstate Commerce Commission v. *Stickney*, 215 U. S. 98 102
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541 ..... 78, 130
Interstate Commerce Commission v. *United States ex rel. City of Los Angeles*, 280 U. S. 52 95

Jones v. *Montague*, 194 U. S. 147 14
Jones v. *Securities & Exchange Commission* (decided April 6, 1936) 96, 98, 165

Kepner v. *United States*, 195 U. S. 100 85
Kindel v. *N. Y., N. H. & H. R. Co.*, 15 I. C. C. 555 .. 88
Knoxville v. *Knoxville Water Co.*, 212 U. S. 1 79

Lehigh Valley R. Co. v. *Board of Public Utility Commissioners*, 278 U. S. 24 79
Lindheimer v. *Illinois Bell Tel. Co.*, 292 U. S. 151 .. 74, 77
Lord v. *Veazie*, 8 How. 251 14
Los Angeles Gas Co. v. *R. R.*, 289 U. S. 287 74
Lucas v. *Alexander*, 279 U. S. 573 99

Manhattan Properties Company v. *Irving Trust Company*, 291 U. S. 320 85
McCardle v. *Indianapolis Water Co.*, 272 U. S. 400 .. 70
Missouri Pacific R. Co. v. *Boone*, 270 U. S. 466 99
Case of Monopolies, Trin. 44, Eliz., 11 Co. Rep. 84b (77 Eng. Reprint, 1260) 76

National Fire Ins. Co. v. *Thompson*, 281 U. S. 331 .. 64
Nebbia v. *New York*, 291 U. S. 502 97

PAGE

Newport Mining Co. v. *C. & N. W. Ry. Co.*, 33 I. C. C. 645 88
New York v. *United States*, 257 U. S. 591 102
Ng Fung Ho v. *White*, 259 U. S. 276 79
Northern Pacific R. Co. v. *Department of Public Works*, 268 U. S. 39 79
Northern Pacific R. Co. v. *Musser-Sauntry Land, Logging & Mfg. Co.*, 168 U. S. 604 85

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287 ..... 52, 78
Oklahoma Operating Co. v. *Love*, 252 U. S. 331 .... 52, 75

Panama R. Co. v. *Johnson*, 264 U. S. 375 99
Phillips v. *Commissioner*, 283 U. S. 569 79
Prendergast v. *New York Telephone Co.*, 262 U. S. 43 ..... 52, 79
Re Proposed Advance in Freight Rates, 9 I. C. C. 382 86
Public Service Commission v. *Great Northern Utilities Co.*, 289 U. S. 130 50

Railroad Comm. of Wisconsin v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563 102
Richmond Screw Anchor Co. v. *United States*, 275 U. S. 331 99

St. Joseph Stockyard Co. v. *United States*, No. 497, present term, U. S. Sup. Ct. 7
Schechter Corp. v. *U. S.*, 295 U. S. 495 102
Smith v. *Illinois-Bell Telephone Co.*, 282 U. S. 133 .77, 131
Smyth v. *Ames*, 169 U. S. 466 70
Southern Pacific Company v. *Interstate Commerce Commission*, 219 U. S. 433 ..... 14, 77
Southern Railway v. *Virginia*, 290 U. S. 190 161
Stafford v. *Wallace*, 258 U. S. 495 ..... 100, 103
Standard Fashion Company v. *Magrane-Houston Company*, 258 U. S. 346 14

PAGE

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420, 64, 65, 76, 79, 81, 84, 103, 132, 133, 141, 146, 156, 161
Tagg Bros. & Moorhead v. *United States*, 29 Fed. (2d) 750 ..... 33, 60, 89, 133
Truax v. *Raich*, 239 U. S. 33 ..... 76, 96
Tyson v. *Banton*, 273 U. S. 418 99

United Leather Workers v. *Herkert*, 265 U. S. 457 .. 100
United R. & Electric Co. v. *West*, 280 U. S. 234 79
United States v. *Baruch*, 223 U. S. 191 85
United States v. *Cerecedo Hermanos y Compania*, 209 U. S. 337 85
United States v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499 102
United States v. *Clark*, 96 U. S. 37 157
United States v. *C. Falk & Brother*, 204 U. S. 143 .. 85
United States v. *Jackson*, 280 U. S. 183 85
United States v. *Midwest Oil Co.*, 236 U. S. 459 85
United States v. *Trans-Missouri Freight Association*, 166 U. S. 290 14

West v. *Chesapeake & P. Tel. Co.*, 295 U. S. 662 79
West v. *Public Utility Commission*, 294 U. S. 79 131
Western Rate Case, 20 I. C. C. 307 ..... 86, 88
1915 Western Rate Advance Case, 35 I. C. C. 497 88

STATUTES CITED.

Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 ..... 1, 10
Interstate Commerce Act 84, 85, 86, 90, 91, 102, 161
Act of July 23, 1868, as amended (5 U. S. C., Sec. 4). 159

Supreme Court of the United States

OCTOBER TERM, 1935

No. 686

FRED O. MORGAN, doing business as FRED O. MORGAN SHEEP COMMISSION COMPANY *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA and THE SECRETARY OF AGRICULTURE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLANTS

OPINIONS BELOW.

The initial opinion of the court below appears in the Record at pages 145-154 and is reported in 8 F. Supp. 766. The concurring opinion appears in the Record at pages 154-157 and is reported in 8 F. Supp. 771. The opinion of the majority of the court on the petition for rehearing appears in the Record at pages 164-166 and is unreported.

JURISDICTION.

The joint and final decree of the court below was entered on June 20, 1935 (R. 166) and appeal was allowed on June 29, 1935 (R. 177). The jurisdiction of this Court is invoked under Section 238(4) of the Judicial Code as

amended by the Act of February 13, 1925, c. 229, 43 Stat 936, 938.

THE STATUTE INVOLVED.

This appeal involves the validity of a rate order made by the Secretary of Agriculture under the Packers and Stockyards Act of 1921, as amended (42 Stat. 159).

Sec. 302 (a) of this Act defines a stockyard as follows:

> "When used in this title the term 'stockyard' means any place, establishment, or facility commonly know as stockyards, conducted or operated for compensation or profit *as a public market*, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling live stock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet." [Emphasis ours.]

Sec. 305 provides that

> "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful."

By Sec. 309 the Secretary is authorized to entertain a complaint that a stockyard owner or market agency has violated Sec. 305; and Sec. 310 provides:

> "SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after

full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

The statute does not authorize the Secretary to regulate either the number of market agencies at any given market or the conduct of their business. Prior to its enactment market agencies (commission men) at Kansas City and other stockyards were practically required, except in unusual circumstances, to be members of the livestock exchanges existing at such markets. One of the purposes of the statute was to remove this condition and provide for the maintenance of a free and competitive market to be con-

ducted by as many market agencies as saw fit to engage therein without the restriction of membership in the Exchange. Nothing in the nature of a certificate of public convenience and necessity is required for entry into or conduct of the business, and the Secretary is not authorized either to limit the number of market agencies or to refuse permits to those applying therefor. The only statutory requirement for doing business as a market agency is that the agency shall be registered with the Secretary "under such rules and regulations as the Secretary may prescribe."[1] The only regulation prescribed by the Secretary, in addition to giving certain information, is that the agency shall file a bond to secure the performance of its obligations.[2] The Act provides that every stockyard owner shall "furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard."[3] Furthermore, an order of the Secretary requiring the Exchange to permit cooperatives to use the facilities of the Exchange upon the same terms as used by the members of the Exchange in effect makes the use of the Exchange facilities open to all registered market agencies.[4] The effect of the statute and of the Secretary's interpretation thereof[5] is not only to permit but to encourage participation in the business by any one who desires to participate therein for the purpose of maintaining a free competitive market without governmental restriction as to the number of agencies and without governmental regulation as to the manner in which the business is to be conducted, except for the purpose of preventing discrimination.

---

[1]Sec. 303
[2]Reg. 17 (b).
[3]Sec. 304.
[4]R. 228-230; Res. Ex. 3.
[5]FF. 129, R. 130. The symbol "FF." refers to the findings of fact in the Secretary's order.

SUMMARY STATEMENT OF THE CASE AND OF APPELLANTS' PRIMARY CONTENTIONS.

The appellants are fifty market agencies engaged in selling or in selling and buying livestock as agents for others at the Kansas City Public Stockyards. They appeal from a joint and final decree of the District Court, as specially constituted, dismissing their petitions in fifty suits[1] brought to enjoin an order entered by the Secretary of Agriculture on June 14, 1933, under Sec. 310 of the Packers and Stockyards Act of 1921 holding existing commission rates unreasonable and unjustly discriminatory and prescribing lower maximum rates (R. 127-130).

While the challenged order fixes *maximum* charges both for buying and for selling, the appellants do not attack the maximum buying charges, but on the contrary take the position that they are, in fact, too high, being mere "paper rates" which cannot in practice be charged and are not being charged by the appellants.[2] They assert that there was no evidence in the record justifying the increase in the maximum buying charges or for the finding that the present rates for this service were unreasonable or discriminatory. Selling charges of appellants are, in practice, uniform; but this is not true as respects buying charges.

The principal business of all of the appellants is sell-

---

[1]The causes were consolidated for purposes of trial and further proceedings, without prejudice to the preservation of the individual rights of the separate plaintiffs to have individual determination of the issues presented by each (R. 163-164).

[2]The maximum buying charges voluntarily adopted by petitioners and filed with the Secretary are lower than the buying charges prescribed in the order. See FF. 84, R. 65, and FF. 180, R. 129.

ing,[4] although many of them also buy livestock for clients. In making purchases, such appellants are engaged in "order buying", *i.e.*, purchasing cattle as agents for persons throughout the country, largely "stockers and feeders" to be fattened or for Eastern packers.[5] A large part of the buying on order is done by market agencies which do no selling.[6] Rules of the Kansas City Livestock Exchange,[7] of which all of the selling agencies other than cooperatives are members,[8] provide that no agency shall buy livestock consigned to it for sale. The local packers who purchase cattle for slaughter maintain salaried buyers at the yards. Off-market packers sometimes employ the services of appellants to buy livestock and sometimes employ salaried buyers.[8a] The market is open, public and competitive, and no one is under any form of compulsion to employ the services of the appellants but may sell or buy, using the market, on his own account, or through a salaried employee.[9] The packers also purchase directly from growers in the country, and this practice is growing.[10]

Appellants constitute all of the market agencies doing a selling business on commission at the Kansas City Stockyards,[11] excepting two cooperative companies.[12] The stock-

---

[4]Almost all sales are for the grower, but a very minor amount consists of occasional sales for registered "dealers" of a few head of slaughter livestock. Such sales are called "seconds." FF. 62, R. 54; R. 318.

[5]R. 202.

[6]FF. 51, R. 50.

[7]Govt. Ex. 9.

[8]FF. 98, R. 77.

[8a]FF. 49, R. 47.

[9]FF. 51, R. 49.

[10]FF. 22, R. 37-38; R. 226, 238-239, 248, 255, 545, 504, 630, 617, 690.

[11]Seven firms engaged exclusively in order buying on the Kansas City market are not parties.

[12]Farmers Union Livestock Commission Company and Producers Commission Association.

yard company's rates for its facilities and services are not involved.[13]

The rates of the appellants were first fixed in a proceeding instituted under the Packers and Stockyards Act of 1921 by a report and award of arbitrators approved by the Secretary of Agriculture on July 27, 1923,[14] and those rates remained in force without material change until 1932.

On April 7, 1930, the Secretary on his own motion instituted the present proceeding inquiring into the reasonableness and lawfulness of appellants' rates. A hearing was had before an Examiner (hereinafter referred to as the "1930-1931 hearing") resulting, on May 18, 1932, in an order signed by an Acting Secretary of Agriculture prescribing lower maximum rates for the future. Prior to that order, and on May 11, 1932, the appellants had individually and voluntarily filed reduced schedules of rates to become effective on May 23, 1932.[15] These rates thus filed by the appellants went into effect, were in effect at the time the order challenged was entered, and are now being collected subject to the impounding order of the court below.[16] As stated in the Secretary's findings,[17] these tariffs were filed in recognition of a very drastic depression in livestock prices in 1932 and to remove admitted discriminations in

---

[13]Cf. *St. Joseph Stockyard Co.* v. *U. S.*, No. 497, present term.

[14]Res. Ex. 24. The arbitrators were the officials of the Department of Agriculture engaged in making the investigation (Secretary Howard M. Gore and Golden N. Dagger, Esq. of the Packers & Stockyards Administration. After a full inquiry they made a complete award (Res. Ex. 24) which was put in effect after approval by the then Secretary of Agriculture without appeal to the courts under a stipulation entered into by the market agencies (Res. Ex. 24).

[15]FF. 1-7, R. 26-30.

[16]R. 131.

[17]FF. 112, R. 82.

the Schedules approved by the Secretary in 1923, due to changed conditions of business.[18]

The Secretary's order of May 18, 1932, was vacated before its effective date; and a rehearing was granted (hereinafter referred to as the "1932 hearing") at which additional evidence was taken before an Examiner.[18a] This rehearing resulted in an order signed by the Secretary on June 14, 1933, finding that the rates (both for selling and buying) of appellants were "unreasonable and unjustly discriminatory" (FF. 179, R. 127) and prescribing still lower maximum selling rates which he finds to be "just and reasonable rates" and increasing somewhat the maximum buying rates (FF. 180, R. 127). That is the order challenged on this appeal. A petition for rehearing and reinvestigation was subsequently denied by the Secretary (R. 3).

The challenged order is accompanied by lengthy findings (R. 23-130) which refer to the evidence offered at the 1930-1931 hearing and at the 1932 hearing. Narrative statements of the testimony taken at both these hearings were before the court below and are a part of the record on appeal. The exhibits offered before the Secretary and the lower court have been brought to this Court as original exhibits. Those deemed most pertinent have been photostated and ten copies thereof have been filed with the Clerk of this Court. These photostats are bound in two parts and will for convenience be referred to in this brief as volumes III and IV of the record.[18a]

As more fully discussed hereinafter, the result of the Secretary's rates is under present conditions confiscatory as to every firm now engaged in the commission business at

---

[18]FF. 28, R. 40; FF. 175, R. 126.
[18a]FF. 8-9, R. 30.

the Kansas City stockyards, and these rates have already driven a number of the present appellants out of that business (see p. 13, *post*). Although the voluminous character of the findings of the Secretary and of the record serves to submerge it, the ultimate basis of the reduction in commission rates prescribed by the challenged order is the Secretary's opinion that there are too many market agencies, too many salesmen, and too much competition in the business.[19] While disclaiming any authority under the statute to determine how many firms shall engage in business as market agencies at the stockyards,[20] he has, in fact, set about to enforce his will and views in that regard by departing entirely from all of the evidence as to the actual cost of employing salesmen in selling cattle at these yards and in making an allowance for salesmanship salaries which is based upon pure speculation and hypothesis and which is wholly inadequate to meet the cost of that service.[21] He has also substituted, in place of his own accountants' figures as to the actual expenditures of the appellants for the cost item entitled by him "Business Getting and Maintaining Expense" (but which we shall establish is in reality, as respects the bulk of such expense, a part of the selling service), a figure less than half the amount of such costs as established by the record, and he has made those allowances by completely disregarding all the cost evidence and assigning a purely speculative and hypothetical allowance for this item.[22] There are other serious objections to the Secretary's findings and order but his action in respect of these items alone is sufficient to account for a

[19]FF. 129, 130, 131, R. 90-91.
[20]FF. 129, R. 90.
[21]FF. 139, 143, R. 95, 97; see Point IV, *post*.
[22]FF. 148, R. 109-10; see Point V. *post*.

major portion of the reduction in rates which he has ordered and to render his order void.

The appellants applied to the court below by petitions in equity as provided by Section 316 of the Act to enjoin and annul the order,[23] asserting[24] that the Secretary had denied petitioner a full hearing as required by the Act and by the Fifth Amendment by his refusal to grant petitioner an individual hearing, by denying petitioner a hearing upon a tentative order, by unlawfully delegating his powers to his assistants, by himself failing to consider the evidence or to hear or consider petitioner's arguments, and by failing to exercise his own judgment;[25] that the order and the rates prescribed thereby were arbitrary and unreasonable because based upon findings made without evidence and contrary to all the evidence and upon findings which ignored undisputed facts; that the rates prescribed were not just and reasonable; that the Secretary's findings and order were based

---

[23]Section 316 of the Packers and Stockyards Act makes applicable the procedure prescribed by Sections 43 to 47 (a) of Title 28 of the United States Code relating to suits to enjoin or set aside orders of the Interstate Commerce Commission.

[24]R. 1-22.

[25]While the statute lodges the rate-making power in the Secretary (Section 310), the record shows that the evidence was taken before examiners, the argument had before Assistant Secretaries Dunlap and Tugwell, and that, while the challenged order is signed by the Secretary himself,

> "the Secretary at the time said Order was signed by him had not personally heard or read any of the evidence presented at any hearing in connection with this proceeding and had not heard or considered oral arguments relating thereto submitted on behalf of this petitioner and had (*sic*) read or considered any briefs submitted by petitioner in this proceeding, but that the sole information of said Secretary with respect to said proceeding was derived from consultation with employees in the Department of Agriculture, out of the presence of this petitioner or any representative of this petitioner." (R. 4-5; see R. 27, 28, 30, 33). See Point VII, *post*.

upon erroneous conceptions of law and were therefore unlawful and void; that the rates prescribed were confiscatory and took petitioner's property without due process of law; that the Secretary erred in overruling a petition for rehearing after his order was made.

The cause was heard in the court below upon the petitions of the appellants, the answers of the appellees, the administrative records made both at the 1929-1930 and 1932 hearings, and additional evidence taken before the court.

The court dismissed the petitions on the merits.[26]

THE LIVESTOCK MARKET AGENCIES INVOLVED IN THE ADMINISTRATIVE PROCEEDINGS AND IN THESE JUDICIAL PROCEEDINGS.

At the time of the institution of the 1930-1931 hearing, there were 62 market agencies engaged in selling or in selling and buying livestock at the Kansas City Stockyard.[1] The audits and cost studies made at both administrative hearings related to each of these agencies. Their names, and the code numbers which were assigned to each for auditing and accounting purposes and by which they

---

[26]The difference between the rates prescribed under the appellants' schedule of May 11, 1932 and those prescribed by the Secretary's order of June 14, 1933 was impounded in the court below during the trial pursuant to the terms of the temporary restraining order (R. 131-132) and the impounding is being continued pending this appeal under the terms of the supersedeas granted by the court below (R. 178-180).

[1]This is exclusive of agencies devoting their entire time to "order buying".

are identified in the original exhibits, are listed in the margin.[2]

---

[2]1 Morgan & Company, Fred O.
4 Ragland-Storts and Burrus Commission Company.
5 Klecker Sheep Commission Company, Hinie.
6 Lewis Flournoy Livestock Commission Company.
7 Maxwell Commission Company, Grover C.
8 McDonald Livestock Commission Company.
9 Nichols Livestock Commission Co., Jno. M.
10 Producers Commission Association.
11 Andrews Livestock Commission Co., L. B.
12 Bowles Livestock Commission Company.
13 Crider Bros. Commission Company.
14 Dixon Commission Company, Chas.
15 Elliott, Swain & Company.
16 Farrar Davis & Campbell Commission Company.
17 Gladish Livestock Commission Co.
18 Haggart, Wilson Commission Company.
19 Interstate Commission Company, W. E. Burrus.
20 Kansas City Livestock Commission Company.
23 Sanders Commission Company, Fern O.
25 Stuart & Company, C. A.
26 Wester Bros. & Smith Commission Company.
29 Stagner, Peironnet & Willis Commission Company.
30 Tamblyn Commission Company.
33 Carnes Commission Company, Henry.
34 Cummings Commission Company, Warren.
35 Drumm-Standish Commission Company.
36 Farmers Union Livestock Commission Company.
37 Link Fasken Commission Company.
42 Long & Perry Commission Company.
43 Knight & Tice Sheep Commission Company.
44 Leitch Sheep Commission Co., W. M.
46 National Livestock Commission Co.
48 Poole-Dempsey-Rutherford Commission Company.
51 Kennaley Commission Company, Harry.
52 Jefferson, Lowry, Davis Commission Company.
53 Ehrke-Martin Commission Company.
54 John Clay & Company.
55 Baucus & Company.
56 Robinson-Hoover Commission Co.
59 Swift & Henry Commission Co.
60 Thies & Son, H.
61 Knighton, Commission Co., Ham.
62 Laird Bros. Commission Company.
63 Martin Bros. & Lee Commission Company.

Upon the institution of the present judicial proceedings on July 19, 1933 (R. 1), petitions in equity were filed by 50 agencies, representing all the selling agencies then in business at the Kansas City Stockyards, aside from two cooperative agencies which have not sought to enjoin the order.[3]

Since the institution of the judicial proceedings and the entry of the impounding order by the court below on July 22, 1933 (R. 131), eight of the agencies which are parties to these proceedings and to the appeal to this Court have been forced to go out of business as a result of the Secretary's new rates, which have, in effect, been put into operation by the impounding order.[4] The interest of these agen-

---

65 Moffett Commission Company.
66 McCormack L. S. Commission Company, Jay D.
67 Peed Livestock Commission Company, W. H.
70 Kile Livestock Commission Company, W. C.
71 Ryan-Robinson Commission Company.
72 Welch Livestock Commission Company.
73 Witherspoon Livestock Commission Co.
74 Boddington Commission Company, Frank.
75 Curtis & Company, W. E.
76 Greer & Company.
77 Inman-Hutton Commission Company.
78 Land Livestock Commission Company, Walter G.
79 White Livestock Commission Company, Less.
82 Wilson, Egan & Company.
83 Burlington Commission Company.
84 Cassidy Southwestern Commission Company.
87 Hamer, Dave.
88 Kimmons Commission Company, Ira.

[3]Firms Nos. 10 and 36—Producers Commission Association and Farmers Union Livestock Commission Company.

[4]Fred O. Morgan & Company.
Hinie Klecker Sheep Commission Company.
Henry F. Carnes Commission Company.
Drumm-Standish Commission Company.
Jay D. McCormack L. S. Commission Company.
Welch Livestock Commission Company.
Walter G. Land Livestock Commission Company.
Less White Livestock Commission Company.

cies in enjoining the Secretary's rates continues by reason of the fact, among others, that a reversal of the decree below and granting of the relief prayed in their petitions would result in the return to them of commissions earned by them and impounded with the clerk of the court below. The appeal presents no moot issue as to them, and they remain as proper parties thereto.[5] In conformity with the settled rule permitting extrinsic evidence upon such matters to be adduced in this Court,[6] affidavits have been filed by these agencies disclosing that while the new rates have forced them out of business they remain parties to this appeal with an interest in the return of their impounded commissions.[7] A certificate of the clerk of the court below showing impoundings by these agencies has also been filed in this Court.[8]

In respect of still another agency,[9] an affidavit has been filed showing that by reason both of the effect of the rates and of failing health, that appellant no longer conducts business in the normal manner but has his consignments received and his commissions cleared through another market agency.[10]

---

[5]*Groesbeck* v. *Duluth S.S. & A. Railway Company*, 250 U. S. 607, 609. Cf. *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433, 452; *Standard Fashion Company* v. *Magrane-Houston Company*, 258 U. S. 346, 353.

[6]*Dakota County* v. *Glidden*, 113 U. S. 222, 225, 226; *Lord* v. *Veazie*, 8 How. 251, 253, 254; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 304, 308; *Jones* v. *Montague*, 194 U. S. 147, 149, 153.

[7]See Appendix A, pp. i-viii. The originals of these affidavits are on file with the Clerk of this Court.

[8]See Appendix A, p. viii. The original of this affidavit is on file with the Clerk of this Court.

[9]Link Fasken Commission Company, Firm No. 37.

[10]See Appendix A, p. vi. The original of this affidavit is on file with the Clerk of this Court.

A motion by the attorneys for the surety of another appellant to substitute the surety in his place and stead[11] informs the Court that that appellant is now in default on his bond as a result of bad management in failing to book all realized costs.

NATURE OF THE SERVICES PERFORMED

The business conducted by the appellants is a personal service business,[1] having for its purpose the procurement of the best possible price for the grower. The physical facilities employed are provided by the Kansas City Stockyards Company[2] whose charges are not in question in the present proceeding. The Kansas City Livestock Market, established in 1871, is and has been for many years the second largest livestock market in the United States.[3] It receives livestock from an area extending from Texas and the western slope of the Rocky Mountains in the South and West to Central Missouri in the East.[4] The market agencies are not only in competition with each other[5] but with other central livestock markets.[6]

Other than cooperatives, market agencies are conducted either by (1) closely held private corporations; (2) partnerships; or (3) by a single individual owning and operat-

---

[11]Motion of receivers of Harry Kennaley Commission Company, Firm No. 51.

[1]FF. 77, R. 60.

[2]FF. 16, R. 34; FF. 30, R. 41.

[3]R. 361; FF. 16, 17, R. 34.

[4]FF. 18, R. 34.

[5]R. 227, 462, 470, 575, 777-778, 781, 1037, see FF. 89-97, R. 73-77; FF. 129-131, R. 90-91.

[6]R. 228, 233, 238-9, 330, 462, 470, 472, 770, 706-707, 734-735, 746, 796, 1035.

ing the agency.[7] In either case, the "owners", whether stockholders, partners or individuals, devote their own personal time and attention to the business and perform a substantial part of the personal service rendered by the market agencies, especially the performance of the all-important function of selling the livestock[8] consigned to the particular agency.[9]

From a social and economic standpoint, as distinguished from the selfish interest of the agency, the purpose of the services performed is to obtain for the grower the best possible price. This requires the exercise of skill, judgment and the highest fidelity to the interests of the client, as recognized in the Secretary's findings[10] but to the importance of which they give scant justice. Most of the market agencies at the Kansas City yards had been engaged in the business for many years prior to the enactment of the Packers and Stockyards Act, many of them, or their immediate predecessors, having conducted such business there for from

---

[7]FF. 52, R. 50.

[8]FF. 132, 133, R. 92; FF. 53, R. 51. In the case of the cooperatives (FF. 52, R. 50) and of market agencies conducting business at a number of markets and having their headquarters elsewhere (R. 292-293), all services performed, including that of selling, are conducted by salaried employees. In a few of the larger resident firms one of the partners or owners may devote his time almost entirely to the performance of managerial or supervisory functions (R. 509), but for the most part the "owners" are actively engaged in selling, at the same time exercising such managerial and supervisory functions over the business of the firm as a whole as may be required (FF. 132, 133, R. 92). Most of the firms conducting the larger share of the business also employed salaried salesmen in addition to "owner" salesmen (*id.*).

[9]Producers of livestock desiring to sell at the Kansas City market consign the stock to a market agency which negotiates and executes the sale as the agent of the grower and, after deducting transportation and Stockyards Company expense, and its own charge, remits the net proceeds to the producer (FF. 73, R. 58).

[10]FF. 81, 82, R. 62-63; FF. 65, R. 55. See FF. 133, R. 92; FF. 138, R. 95.

25 to 50 years.[11] And many of the "owners" rendering these personal services have been engaged in the business for the same period.[12] This is particularly true of the larger firms carrying on the greater part of the business done. In other words, the "owners," whose rates and consequently whose livelihood are affected by the Secretary's order, have made this business their life work.

The salesman, be he owner or employee, is not a mere auctioneer, but a bargainer whose job it is to obtain for the grower the best possible price for the particular number, grade and quality of the livestock sold.[13] The price on a single day's market will vary on different classes of cattle from $2.50 to $14.50 per cwt.[14] Bids from different cattle buyers may and do vary as much as $1 to $1.50 per cwt. for the same cattle on a single market day.[15] This means a difference to the grower of from $10 to $15 per head between low and top prices on a thousand-pound steer in a single day's trading.

The livestock of each shipper is sold separately and according to grade, each sale being designated as a "draft," the average draft of cattle consisting of 5.22 head.[16] The increasing proportion of "truck-in" receipts,[17] the tendency toward smaller consignments and consignments of plural ownership,[18] and the increased particularization in demand,[19] have in recent years caused a decrease in the size of drafts

---

[11]Res. Ex. 204.
[12]R. 271, 272.
[13]FF. 65, R. 55.
[14]R. 331, 319.
[15]R. 204, 324.
[16]Pet. Ex. 9, R. Vol. III, p. 11.
[17]FF. 26, R. 38.
[18]FF. 24, R. 38.
[19]FF. 53, R. 51.

and have caused the business to take on more of the aspects of the retail handling of a commodity.[20]

A graphic illustration of the bargaining process through which the salesman endeavors to obtain the best possible price for the grower may be found in the testimony of the first witness called by the Government at the first administrative hearing, Mr. Fred H. Olander, one of the officers and managing stockholders of the National Livestock Commission Company, ranking fourth in the volume of business done,[21] and himself a "fat cattle" salesman.[22] Mr. Olander testified:

> "Last week I handled two loads of cattle for a man in Kansas. I asked a packer buyer 11 cents a pound for them. He bid ten and a half and left me. I got another packer buyer, and he bid 10.75, and then I got another packer buyer and he bid 10.85. I appreciated the fact that I was getting close to the value of those cattle on that particular market day. I came pretty close to accepting that last bid of 10.85. As I was walking down the alley, I met the buyer who had been in the pen first. He asked me if I wanted to sell them to him, and I said I absolutely did not. When he asked me why, I said that it was because I was bid 35 cents a hundred more than he had bid me. He went back to look at them, and I stood pat for my 11 cents, and just missed the mark by five cattle, which I took out at a dollar a hundred less, which made the cattle average just about 10.90." (R. 240).

The difference in the return to the grower as a result of this successful bargaining upon the part of Mr. Olander,

---

[20]FF. 28, R. 40.
[21]Res. Ex. 243, R. Vol. III, p. 42.
[22]R. 202.

between the price received and the price first bid, was thus 40 cents a hundred or $4 a head on a steer of 1,000 pounds. Mr. Olander's commission would have been the same if he had accepted the first bid. The additional return to the grower resulting from Mr. Olander's careful and time-consuming bargaining was thus over six times the commission paid,[1] which is on a headage basis and not on a percentage of price received both under the existing rates and those prescribed by the Secretary. Obviously, if instead of engaging in this bargaining process, Mr. Olander had been willing to accept the first bid after such limited bargaining as he might have then engaged in with the first bidder, he could have sold within the time consumed by the sale of this draft of cattle three times as many cattle as he did sell, for, during this period, he conducted three successive bargains.

Price, not volume or speed, is the test of a salesman's ability and value. All of the witnesses so testified. There is no evidence to the contrary. The difference between the effective and ineffective conduct of salesmanship, from the standpoint of the grower whose agent the market agency is and whose interest it was the primary purpose of the Act to protect, is evidenced by an exhibit[2] showing the range of average prices received in 1931 by the several agencies on light weight cattle from a low of $10.43 a head to a high of $19.40, and on heavyweight cattle (the kind that Mr. Olander sells) from $36.52 to $68.52. Mr. Olander's firm, whose selling practices in respect of heavy cattle are illustrated by the foregoing excerpt from his testimony, ranked

[1]The charge on such a consignment ranges from 60c to 70c per head according to the size of the consignment. The charge here would be 64c. R. 64.

[2]Res. Ex. 249, R. Vol. III, p. 43.

eleventh of all the 60 agencies in the returns per head to the grower on heavy cattle, averaging $61.94 against the low of $37, the high of $69 and an average of $59.57.[4]

As also appears from the testimony of Mr. Olander, called by the Government as its own witness, he frequently holds cattle over two or three days for sale, sometimes as long as a week, in the pursuit of the primary purpose of obtaining for the grower the best price, thus slowing up sales, cutting down salesmanship performance, if measured only by the number of cattle sold per year, but increasing thereby returns to the grower.[5] The selling period is theoretically between 9 A. M. and 3 P. M.; but the active selling period is dependent wholly upon the buyers who sometimes come out late and sometimes go in early and who buy quickly or slowly at their option.[6]

Salesmen's services, be they owners or salaried employees, are not confined to the sale of cattle, with the bar-

---

[4]Res. Ex. 249, R. Vol. III, p. 43 (Firm No. 46). Under the Secretary's order Mr. Olander, who the record shows works approximately 12 hours a day, performing other duties before and after sales hours, and who carefully bargains in the interests of his shipper with the results shown both by the illustration given and by the average result of his sales, would receive as his share of the profits for his firm (all of whose members likewise devote all of their personal time to the conduct of the business, largely in selling), after deducting the expenses incurred in its conduct, but before any compensation whatever to members of the firm, the munificent sum of $1,124 per year (Pet. Ex. 4, R. Vol. III. p. 6, col. n).

[5]Mr. Olander testified: "It is the job of the salesman to get the highest possible price. The price is not tagged on these livestock. The price must be determined as the result of trading between buyers and sellers, and the exercise of judgment. It has been my experience that the first bids placed on livestock are much less than I finally get for them. *I may have to work all day, and I may have to work a week, and I have worked as long as a week selling one load of cattle.* The commission man is interested in getting the highest possible price, and he is willing to work as long as it is necessary to do that" (Emphasis ours) (R. 217).

[6]FF. 65, R. 55.

gaining process involved as described by Mr. Olander, but include other services all of which, however, are directly related to salesmanship and constitute a proper part of the cost of sales. These services include

(1) early morning examination of dealings on and prices received at the several markets during the preceding day and of the character of buying, particularly by the packers at the Kansas City yards, on the previous day from which judgment is formed as to the probable character of the buying to be anticipated on that day;[7]

(2) personal examination of the cattle consigned to his firm in the course of which he participates with the yardmen in the grading and sorting of stock;[8]

(3) acquisition of first-hand knowledge as to conditions under which cattle consigned to his firm have been grown, fattened and fed, including climatic conditions, nature of feed, degree of care exercised by the grower. This information is obtained by the salesman in part through correspondence but more largely by personal visits to the feed lots and farms, which may be properly described as country contacts which the uncontradicted testimony shows were advantageous to the grower although performed solely at the expense of the agency. As a result of the information obtained from these country contacts, the salesman can obtain a better

[7]R. 205, 206; FF. 64, R. 54.

[8]FF. 63, R. 54; FF. 65, R. 55. Specilization in demand for particular kinds and qualities of livestock, leading to increased sorting, has been greatest in the case of cattle. FF. 53, R. 51.

price in his bargaining with buyers at the market.[9] Moreover, the knowledge about the cattle obtained through these country contacts enables the agency better to advise the grower when to ship to market.[10] The fact that these trips are usually upon request and that requests exceed the ability of the agencies to respond[11] demonstrates the value of this activity to the grower.

Services of the latter description were classified by the Secretary and his accountant as a part of the cost of getting and maintaining business. In one sense they may no doubt be properly so classified. In point of fact, however, they are costs incurred by the agency for the purpose of getting the best price obtainable for the grower and are more logically assignable to selling cost than to the cost of getting and maintaining business. These country contacts are also of value in enabling the agency to advise the grower how to care for his cattle in order that they will be

---

[9]R. 224, 332-333, 606, 629, 661, 1053-1054; cf. FF. 64, R. 54. For example, one salesman testified:

> "Purchasers of slaughter cattle want to know how they have been fed. It is an advantage to a salesman to be able to tell the purchasers accurately and to base his statement upon his own observation and information. It is not so much of advantage to the salesman as it is to the owner of the livestock. He is the man who benefits." (R. 1053).

[10]R. 603, 668, 728; FF. 93, R. 75. A cattle salesman testified:

> "We very often get requests to make these trips. I know the kind of cattle that a great many of my customers handle, how they feed them, pasture them, and the location they are in. When I see them I am better able to advise them how to market them, and that is the advice they are generally seeking." (R. 668).

[11]FF. 93, R. 75; R. 207, 212, 550, 570, 629, 661, 664, 665, 671.

of the best quality when sent to market.[12] Similar service of value to the growers is performed by the market agencies in arranging for and supervising the pasturing of cattle near Kansas City.[12a]

After the market closes salesmen, particularly owner-salesmen, do office work consisting of conducting corrrespondence with growers, performance of managerial functions, etc.[13] The agency remits to the grower upon the day of sale, customarily before it has been paid by the buyer, thus requiring the use of capital or credit for this purpose and assuming the risk of non-payment by the buyer.[14]

The owners of these agencies customarily arrive at the yards around 6 o'clock in the morning and remain until 5 or 6 o'clock in the evening and often until midnight.[15] The

---

[12]R. 448, 461, 512, 603, 670, 671. A cattle salesman testified:

> "A Texas customer, about the first of December, asked me to go to Sudan, Texas, to look over 500 cattle which he had on feed at a cotton mill. We went to look at the cattle and found that they had about three kinds of cattle in there. I told him in the first place that his cattle were not fat, that he would have to keep them longer and when he went to shipping these cattle to ship a couple of loads of the heaviest plainer cattle, one load of the light handy cattle and one load of the Mexicans at a time. I told him that he ought to keep them 30 or 40 days longer before he commenced shipping anything. He told me to write him every week in regard to his kind of cattle and tell him when to ship and what to ship. I commenced shipping three loads of those cattle for Monday's market three weeks ago. He has about 200 of them left and I wired him not to ship any more for a couple of weeks. Now, that is what they put up to you. They claim it is worth a lot of money to them for you to see this stuff. The Drovers Telegram and the radio business do not give them any information on the kind of cattle they have and they are interested only in their kind of cattle." (R. 670-671).

[12a]FF. 95, R. 76.

[13]FF. 74, R. 59.

[14]FF. 78, R. 60.

[15]R. 447, 316, 459, 577.

typical day of such an owner is illustrated by the evidence of Mr. Olander,[16] the Government's first witness, given on his direct examination, and reproduced in the margin.[17]

---

[16]Similar but individually less comprehensive discriptions of a salesman's typical day will be found at R. 441-442; R. 304-305; R. 567-568; R. 441; R. 538; see also FF. 64-67, R. 54-6.

[17]Mr. Olander testified (R. 205-209):

"In describing the activities of fat cattle salesmen I will use myself as the individual I am going to describe. One of the yard men calls me the first four mornings in the week at 5:15 during the fall season of the year, when, because of the greater amount of sorting and larger strings of cattle which arrive from the pastures in the fall of the year, it is necessary for us to get down earlier than usual, in order to get the sorting done in time to show it at eight o'clock in the morning when the market opens. During the winter season, when there is not the big strings of cattle, and the consignment consists more of smaller units, we generally figure on arriving at the market between six and seven [fol. 244] o'clock, depending on the amount of business that is in sight for that day. The yard man calls me again when he reaches the yards around six o'clock, and know[s] what has arrived during the night. When I arrive and change my clothes, I immediately go to the bulletin board in the lobby of the Exchange Building, upon which is placed the receipts of a great many of the principal livestock markets in the country. I can tell something about the available supply on that day's market. On the previous day, I have made it a point to contact as many of the head steer buyers for the packers as possible, and try to get from them any information which might be of value to me on the next day. They may have an inquiry for a certain class of cattle, and I get from these buyers all the information I can relative to the way the cattle that I have sold them have dressed out. After I have sized up the receipts of the different markets, I go out to the pens and I go into each pen in our alley which contains steer cattle. I look each pen over very closely. I decide whether or not that particular pen of cattle should be sorted to bring the most dollars. I look them over for weight, for quality, and I have in mind their origin. I have in mind the particular owner, and how he handles his cattle. I take into consideration the conditions as to the fat of these cattle. I look at their briskets and their loins, and I put my hands on some of them to feel the amount of fat that they carry. I take all these things into consideration in making up my mind how we are going to handle that particular load of cattle, and what I am going to ask for them. Then, I put [fol. 245] these cattle out in the alley, and sort them, as previously described. Those cattle which we do not have to sort are split

In addition to salesmen, whether employees or owners, the agencies also employ yardmen and clerical help. The

---

into small lots of eight or nine cattle to the pen, in order to give them every chance to drink.

"After I have gone through the performance of grading and sorting these cattle, and fixing them up ready to show, I will drop into the lobby of the building, and look at the eastern beef markets. We know that Boston, New York and Philadelphia are right in the center of the big consuming trade of our country. If beef is moving pretty well down there, maybe at higher prices, it is some indication to me that maybe I can get some higher prices for the live cattle that I have got to sell. I have the report of the receipts, and I also have the boys in the office get me every morning the amount of cattle that the different buyers of fat cattle have purchased the day before. I keep a check by days of the packer buyers' operations, and I will see how many they bought compared with previous days' purchases. It may show that one packer has not bought many cattle. I know that he has a plant that he must keep going, and I know that he is going to have to have livestock. So, I have a hunch that he might be a pretty good buyer the next day. I make it a point to get him when he comes out in the morning and show him my cattle.

"I may have seen a number of these cattle in the country. We have many requests coming from the country, and I have gone to the owner's farm in order to counsel with him and advise him what to do. I spend a good many week- [fol. 246] ends in the country. All of the members of our firm do some appraisal work; that is, I mean they go to the country and advise with customers in regard to the handling and marketing and the present value of their livestock. I could do a lot more country traveling than I do, but it is quite expensive. We have not got enough men to put them out to make the visits that we are requested. I do not imagine that I have asked a half a dozen people in my life for a load of livestock. I have an idea that if I cannot impress myself upon the owner of the livestock by the way I work for him, and by the things I stand for, I don't think that I would gain much by asking him to ship to me. The fact that I am there would indicate to him that I would be glad to help him in the sale of his livestock.

"We spend quite a little time hunting buyers. That is different on different days. There are days when there is a good active market for fat cattle and it may be that receipts are short on that day. The buyers will look you up on those days. When you have lots of them you have got to put in your time trying to get buyers. Our firm has two fat cattle salesmen, two butcher cattle salesmen, one calf salesman, two hog salesmen, and our sheep salesman is a man who has a commission business of his own. The fat cattle salesmen sell fat steers and feeders. I sell most of the fat cattle in a

livestock is received by the yardman from the Stockyards Company, whether brought in by rail or truck or

---

year's time and he will sell most of the feeders. In the butcher cattle division my brother sells the fat butcher stock and the bulls. The other butcher salesman sells the stocker and feeder female cattle. [fol. 247] We also have one stocker and feeder salesman on steers. The fat steer salesman, other than myself, devotes his principal attention to selling those cattle that come in as stockers and feeders which are fat enough to be sold for slaughter. In a very small firm one man may sell all the cattle that he receives. In our opinion it is an advantage to our customers by reason of the fact that we have two fat steer salesmen. In the opinion of others it may not be any advantage. The volume of business in some firms might be so small as not to permit it. The purpose of having different salesmen for different grades of cattle is to render a greater service. It is also occasioned by the buying methods of packers. Instead of weighing all the cows to one pen as they used to do, they have a number of different pens and in selling to those packers a commission firm is required to weigh these cattle to the different numbered pens. I do not know what proportion of our cattle is sold as fat steers. We contact with the buyer either by locating him in the yards or in the event he may come to our pens he will say, 'I will buy certain kind of cattle.' We have to know whether or not we have cattle in the alley that is the kind he wants and we will escort him to the pens, let him in and go with him. He will ride through the cattle and we will be right there by his side as he looks them over. If he decides he can use them he makes a bid which may be what you think is about the worth of the cattle and then you commence to trade with him. You try to get him to put on some more and use the best sales talk you have. You give him all the [fol. 248] information about cattle, as to where they came from and who fed them. He may not come up to the price that we think the cattle are worth and we will let him go and then get another buyer.

* * * * *

"The local packers have other buyers for butcher cattle and for calves. According to trading customs we do not have an unlimited amount of time to make up our minds whether or not we will accept a bid because when a buyer leaves your alley he does not have to take the cattle at the bid he placed on them. If you sell to him while he is within the confines of your alley under the trading rules he must take them. The salesman sells [fol. 249] when in his judgment he has gotten the best price. After I have sold a pen of cattle I tell my yardman that the pen of cattle weighs to such and such a buyer. When he has free access to the scales and when he can move clear up to the scale gate he opens the gate, or I may open the gate and drive the cattle out. He goes ahead of the cattle to the scales and I may fol-

driven in, and is driven by him and his associates (the number depending, of course, upon the size of the business conducted) to pens set aside by the Stockyards Company for the particular agency. Identity of ownership is preserved by the yardman and, as previously stated, the cattle are thereafter graded and shaped up for exhibition and sale by the salesmen and the yardmen jointly.[18] The salesmen also frequently assist the yardmen in the performance of strictly yard duties and yardmen frequently assist salesmen in the making of sales. Office work may be performed by owners, salesmen, yardmen or strictly office employees, according to the size and requirements of the particular agency involved.[19]

Most of the market agencies send out periodical market reports to their customers. These are not duplicates of official reports. They vary in content, and contain general

---

low them, somebody else may follow them or the owner may follow them. At the east end of the scales is a stockyard company employee who has charge of the gate. He will open the gate and we will push the cattle onto the scales and close the gate. Our yardman tells the stockyard man to whom the cattle are to be weighed. The stockyard company man calls through a tube to the stockyard foreman on the other side 'National Livestock to so and so.' Our yardman goes into the scale house and tells him who owns the livestock and to whom they are to be weighed. The weighmaster weighs the cattle, marks the weight down, and makes notations relative to who is weighing them, the buyer, the owner, the number of head and the weight. When the cattle have been counted off the scales by the stockyards-foreman he registers the number of cattle in the draft on a machine which also registers in front of the weighmaster, he records the number of head on the ticket. The weight is then stamped on the ticket. He compares the stamped weight with the written weight and turns the ticket over to the yardman. The yardman averages the weight and writes a description of the cattle on the ticket and hands the ticket [fol. 250] to the salesman who registers the price at which he sold the cattle.

[18]For a description of a yardman's typical day, see R. 488-491. See FF. 41-44, R. 44-45.

[19]FF. 54, R. 51; FF. 115, R. 115.

market information, comments upon marketing problems, and information about particular matters of interest to the growers, such as information about particular sales which enables the seller better to judge the worth of his own cattle.[20]

RELATION OF RATES TO VALUE OF SERVICES

The ratio of total earned charges of market agencies at the Kansas City market to gross sales and purchases at the existing rates is very low.[1] Charges for selling livestock in 1929 were but .084% of the value of the product[2] as compared with 1.18% for corn, 1.20% for wheat, 1.58% for oats, 3.88% for eggs, 5.27% for hay, 7% for vegetables in carload lots, 10% for vegetables in less than carload lots, 10% for citrus fruits in less than carload lots, 10.26% for wool and 12.20% for hides. Also, it is disclosed by the evidence that commissions customarily paid for selling livestock in large droves on the farm or ranch are higher

---

[20]R. 730-733, 295, 548-549, 925; FF. 89, R. 73.

[1]Howard D. Dozier, economist in the Bureau of Animal Industry, Department of Agriculture, testified at the first hearing:

> "There is a small ratio between the value of the livestock sold and the commission charged. The raising of railroad rates by a flat 100% would kill a very great deal of railroad traffic. The situation with railroad traffic is not analogous to the commission business. Purely from the standpoint of the value of the service to the shipper of the livestock, it might be possible that you could double your rates and kill off a comparatively small amount of your business. You might lower the rate and get no added volume as a result of it. * * *" R. 422; see also R. 426.

[2]Res. Ex. 56, R. Vol. III, p. 40. See R. 140. Since the charge does not vary with the value of the product, the ratio of commission charges to value of product will vary with fluctuations in livestock prices. The ratio would be somewhat higher at the present time than it was in 1929.

than the rates held reasonable by the challenged order.[3] It is admitted in the answer that market agencies at Kansas City only increased rates 10% during the war period while other wages, including farm wages, increased more than 200 per cent.[4]

SEASONAL AND OTHER VARIATIONS

The arrival of cattle at the Kansas City market is subject to daily and to seasonal fluctuations. Cattle arrive in diminishing volume during each day in the week. The Monday receipts amount on the average to 49.5%[1] of the total weekly receipts, and Fridays and Saturdays are very inactive.

Due to climatic conditions and other factors, there is a very pronounced seasonal variation in the receipt of livestock at the Kansas City market. The seasonal variation in the Kansas City market is much greater than at the Chicago market. The detailed figures in the record for 1931 show that monthly cattle receipts at the Kansas City yard varied from a low in July of 101,705 head to a high in October of 201,489. The average monthly receipts amounted to 138,998, or 69% of the receipts in the peak month. On the other hand, the variation in cattle movement at Chicago in 1931 was only from a low in February of 153,918 to a high in October of 226,236, and the relation of the average of 190,546 head to the peak month was

---

[3]R. 886.

[4]R. 140.

[1]Govt. Ex. 116, R. Vol. III, p. 39, gives daily receipts at the Kansas City market for each species for 1930, 1931, and January to September, 1932. The figure of 49½% is calculated from the 1931 figures in this exhibit, as are the other items respecting receipts of cattle at the Kansas City market hereinafter given.

84.2%. The ratio of average to peak receipts, commonly called "load-factor," is universally regarded as having a most vital effect on unit costs for the entire period, since the capacity must be adequate for the peak volume.[2]

The above figures demonstrating the peak movement are a conservative statement, for, in fact, the seasonal peak is not necessarily measured by the monthly figures but may as properly be measured by the weekly figures. Thus the highest weekly receipts of cattle at the Kansas City market in 1931 amounted to 51,222 head, as compared with average weekly receipts of 31,989 head, giving a ratio of average to peak receipts equal to 62.45%.

The full force of the combined standard weekly and seasonal fluctuations is sharply brought out by comparing the highest day's receipts of 30,002 head on October 12 to the average per day receipts of 5,380 head, which gives a ratio of average to peak volume of 17.9%.[3] In addition to these variations in volume, the conditions at the market are subject to variations in the character and the supply of and demand for livestock which substantially increase the burden of the salesman's work.

The evidence is uncontradicted that the business of selling livestock is one requiring skill and judgment, and indeed the Secretary has so found.[4] The evidence is also undisputed that neither in the case of a salesman nor a yardman can a market agency pick up a man for only a

---

[2]America's Capacity to Produce (Brooking's Institution, 1934), pp. 99, 322; cf. FF. 115, R. 83-84.

[3]Several witnesses stated that the possible volume per salesman is substantially limited by the unevenness of receipts, but that although every effort has been made by the agencies to correct this condition, it is in fact one which only shippers and buyers can correct. See, *e.g.*, R. 219-220, 927.

[4]FF. 81, R. 62; FF. 65, R. 55; FF. 133, R. 92.

few days' work or a few weeks' work and operate efficiently, for skilled men demand and receive steady compensation.[5] Of course, there is some addition of extra salesmen and yardmen during peak periods, but the evidence is undisputed that the business cannot be carried on by the use of extra men only.

THE FINDINGS AND ORDER OF THE SECRETARY

The Secretary's Findings and Order (R. 23-130) contain a long narrative statement of the nature of the business, the manner in which conducted, the facilities employed, division of the business among the several agencies, facts claimed to be established by the audits and statistical studies, the ultimate conclusions to be drawn therefrom and the prescription of the rates to be charged on a headage basis, graduated according to size of the consignment in each species.

Many of the findings are unexceptional; others, it is believed, are unsupported by any evidence, or at least any evidence of a substantial character, and are contrary to the uncontradicted evidence in the case in particulars to be hereinafter noted.

The Secretary's ultimate conclusions as to the reasonable cost of conducting the business, allocated functionally, and as expressed in his Finding 163, are as follows:

> "163. A summary of the foregoing findings as to reasonable per head costs and reasonable profits for selling each species of livestock arriving at the Kansas City market is as follows:

---

[5]R. 738; FF. 115, R. 84.

	Cattle and Calves	Hogs	Sheep
Salesmanship	$.1379	$.0353	$.0140
Yarding Salaries	.0750	.0300	.0080
Yarding Expenses	.0140	.0060	.0004
Office Salaries	.0525	.0300	.0100
Office Expenses	.0300	.0175	.0050
Business Getting and Maintaining	.0450	.0180	.0059
Administrative and General Expenses	.0330	.0200	.0050
Insurance	.0070	.0025	.0013
Interest	.0150	.0070	.0040
Total Cost	.4094	.1663	.0536
Profit			
To cover management	.0350	.0133	.0040
To cover uninsurable risks	.0035	.0014	.0004
Total reasonable cost and reasonable profit	$.4479	$.1810	$.0580"

As appears from the foregoing table, the largest single element of cost is that involved in salesmanship. As to this item, the findings admittedly depart from all cost evidence and determine the reasonable per head cost of salesmanship solely upon the basis of dividing the annual salary found to be reasonable for salesmen,[1] by the total number of head which the Secretary determined a salesman should sell per year.[2] There is no evidence that any sales-

[1] $4,000 for cattle salesmen, $3,000 for hog salesmen and $3,500 for sheep salesmen. FF. 143, R. 97.

[2] 29,000 head of cattle, 85,000 head of hogs and 250,000 head of sheep. FF. 143, R. 97.

man at the Kansas City yards in the year 1931, or in any other year, equalled the hypothetical performance assumed by the Secretary. On the contrary, as to each and every agency, including those having the greatest volume of business, the average number of head sold per salesman is materially less than the hypothetical standard set by the Secretary for the determination of the "reasonable cost" of salesmanship.[3] This is not, therefore, a case like the *Tagg* case where the evidence disclosed different degrees of performance, as measured by the number of head sold per year per salesman, out of which the Secretary, in the exercise of an informed judgment based upon actual experience, accepted as the standard of performance a performance actually realized,[4] but is a case in which he has based his finding upon a purely hypothetical performance not equalled by any. Nor is this rejection of actual performance as to any and the substitution of a purely hypothetical performance as to all predicated upon any evidence that the business of any agency is inefficiently or uneconomically conducted.

In respect of yarding salaries (FF. 144), yarding expenses (FF. 145), office salaries (FF. 146), office expenses (FF. 147) and administrative and general expenses (FF. 149), the cost tables constituting the evidentiary portion of these findings purport to be the cost figures as ascertained by the Government's accountants for the year 1931 as appearing in Government's Exhibit 115; and the ultimate finding in respect of each of these items purports to be based upon such accountants' cost figures

---

[3]See Point IV, *post.*

[4]See *Tagg Bros. & Moorhead* v. *United States*, 29 Fed. (2d) 750, 755.

as therein set out. In some cases, the cost figures in respect of these items of expense as set out in the Secretary's findings correspond with the same functional costs as ascertained by the Government's accountants and, in others, particularly the salary functional costs, are materially less.[1] Findings which, on their face, purport to be based upon the Government's accountants' figures are not, therefore, when compared with such figures, based thereon, but have been reached by some undisclosed process of revision.

In respect of the item of business-getting and maintaining expenses, the finding (148), after setting out as evidentiary facts the Government's accountants' figures as to actual out-of-pocket expenses of the various firms for the year 1931 (other than salaries), completely disregards this and makes an ultimate finding that the reasonable cost of this item should not exceed 10% of the total reasonable costs and profits. In other words, this finding has no factual foundation whatever, but is a purely arbitrary figure based neither upon any evidence nor upon any evidentiary finding, but contrary to both. It apparently rests solely upon the belief on the part of the Secretary that too much is being spent for these purposes. What items have been excluded and what included, however, is not disclosed by the findings, although the Government's own accountants segregated this item into each of its several elements. In their original allocation there was included in the functional costs assigned to this item that proportion of the salaries of persons devoting a portion of their time to this function upon the basis of its estimated relation to their time as a whole. This part of the expense of "business-getting and maintaining" has been eliminated altogether, apparently in

---

[1]See Point VI, *post*.

recognition of the fact that, because country work is done only at times when there is no work to be done at the yards,[3] the expense for this valuable service is only its out-of-pocket cost. Disregarding this omission, however, it requires but a simple mathemetical calculation to establish the purely arbitrary character of this 10% overhead figure for business-getting and maintaining. It appears (see pp. 139-140, *post*) that the resulting allowance is in the aggregate about 50% of the actual out-of-pocket expenses allocated by the Government's accountants, to this function, exclusive of salaries. To this function, the Government's accountants assigned the expense of country contacts and appraisals and a collection of miscellaneous expenses, including market reports, advertising, solicitation, maintenance of the Exchange, etc. The first named service, as appears from the foregoing statement of the nature of the business, is performed in large part, if not primarily, for the benefit of the grower as an aid to the procurement for him of a good price and, as we have hitherto pointed out, might properly be regarded as a part of the cost of sales rather than of getting business. The evidence is uncontradicted, and the Secretary does not deny, that the performance of this service is advantageous to the grower for whom the services of the market agencies are performed and for whose protection and benefit the Act was passed.[4] There is no evidence that more of this service is furnished than is required.[4] On the contrary, the uncontradicted evidence is that there is less of this service performed than the growers would like to have performed.[4] In respect of

---

[3] *i.e.* on week ends and during dull seasons. See *ante*, pp. 29-30, and FF. 115, R. 84.

[4] See pp. 21-23, *ante*.

the other expenses, which may be more properly classed as expenses incident to getting and maintaining business, the Secretary has found that some expenses for this purpose are necessary,[5] but concludes that too much is being spent. These two classes of expenditures are substantially equal.[6] In other words, one-half of the total cost allocated by the Government's accountants under this heading is attributed to one of these services, and the other half to the other. The total allowance resulting from the application of the arbitrary 10% overhead figure is almost exactly one-half of the total cost.[7]

Since the allowance is on a percentage basis without any findings whatsoever as to what elements of cost are intended to be included, what to be omitted, or the extent to which any specific cost item has been reduced, it is purely arbitrary, and the expenses to be included therein are a matter of mere speculation.

If, for example, it is intended to include all of the cost of country contacts and appraisals, clearly a necessary item of expense in the interest of the grower, then it includes nothing for the remaining expenses in the nature of advertising, market reports, support of the exchange, etc., although it appears from the Secretary's own findings that expenditures for these purposes should, at least to some extent, be a charge upon the business. If it is intended to include the latter items, then it leaves nothing for expenses incurred in country contacts and appraisals. If it is intended to cover all, then it obviously contemplates a reduction in each, without finding or evidence as to the extent to which the cost of either is too high.

---

[5]FF. 148, R. 109.
[6]See *infra*, p. 143.
[7]See *infra*, pp. 139-140.

EFFECT OF THE RATES PRESCRIBED

The Secretary's rates are made on a headage basis, varied as to each species, according to the number of head per consignment, some being above and others below the so-called "total reasonable cost and profit" per head, as found by the Secretary.[1]

After the order was entered, the appellants' accountant made an application of the prescribed rates to the actual business of each agency for the test year (1931) for the purpose of determining the revenues which would be yielded to it by such rates. This study, accompanied by a comparison of the revenues so yielded, with the actual cost of the services performed as ascertained by the Government's own accountants, was offered in evidence before the Court below.[1a] An analysis of this evidence will be found in that part of the argument which deals with the confiscatory and arbitrary character of the rates prescribed. It is sufficient at this point to make the following observations.

(1) In the aggregate, the rates provided are barely sufficient to cover the actual out-of-pocket costs of the business as conducted, exclusive of any compensation to the owners for the personal services performed by them[1b] (largely as salesmen) for which the Government accountant himself allowed

---

[1]R. 122, 128.

[1a]Petitioner's Exhibit 1 (R. Vol. III, p. 1) compares the revenue yields of Tariffs Nos. 2 and 3 with those of the rates prescribed in the Secretary's order, for each species for each firm, by applying the respective rates to actual transactions in 1931. Petitioner's Exhibit 4 (R. Vol. III, pp. 5, 6) compares the yields so obtained with 1931 costs as found by the Government accountant (Govt. Ex. 115, R. Vol. III).

[1b]Pet. Ex. 4, R. Vol. III, p. 6, col. n; see table, p. 56, *post*.

$397,419.12[2] as an item of cost. These figures are exclusive of the two cooperative agencies. There were 136 "owners" performing such services in the year 1931.[3] This number divided into the Government's accountants' cost allowance for their services ($397,419.12) produces an average of $2,922 per owner, clearly less than the reasonable value of their services.[4] Under the Secretary's rates, the average amount left to compensate these owners for the personal services which they perform is reduced from this figure, itself inadequate compensation, to $486.62 per year.[5] For the two cooperatives the rates fixed would fail to yield the out-of-pocket cost of services performed by them in the amounts of $22,782.76 and $14,346.02 respectively.[6]

(2) The Secretary found that eleven firms handled over 50% of the business and that twenty-three firms handled over 75% of the business received by all (FF. 86, R. 68-71). The revenue at the prescribed rates would exceed the actual expenses incurred by the eleven firms in 1931, as found by the Government's accountants, exclusive of any compensation for personal services performed by

---

[2]Pet. Ex. 4, sheet 1, col. c and c, sheet 2, col. c, R. Vol. III, pp. 5, 6.

[3]Govt. Ex. 115-B, R. Vol. IV; see Pet. Ex. 4, sheet 2, col. m, R. Vol. III, p. 6.

[4]This would appear to be self-evident from the foregoing description of their work, responsibilities and the degree of skill and judgment required (*ante*, pp. 17-29); and is confirmed when contrasted with the Secretary's own findings as to the reasonable value of the services of *hired* salesmen, which he put at $4,000 a year for a cattle salesman, $3,000 for a hog salesman and $3,500 for a sheep salesman (FF. 143, R. 97), although the record shows that many salaried salesmen earned more than these amounts (FF. 139, R. 95, 96).

[5]Pet. Ex. 4, sheet 2, col. n, R. Vol. III, p. 6; see p. 53, *post*.

[6]Agencies 10 and 36 (Pet. Ex. 4, sheet 2, col. j, R. Vol. III, p. 6).

their owners or for any return on the investment, by only $7,920.37.[7] For the twenty-three firms handling 75% of the business, the revenues at the Secretary's rates would exceed the actual out-of-pocket expense in 1931, exclusive of any compensation whatsoever for owners' services or for return on the investment, by only $25,025.38.[8] Each of the eleven firms had a volume large enough to admit of the most economical use of forces and time. There is no evidence that any of these eleven leading firms, accounting for 50% of the business, spent more than it was required to spend for the successful conduct of its business and in pursuit of the business for which it is operated, namely, to procure for the grower the best possible price. The same is true of the twenty-three firms accounting for 75% of the business. Nor is there any evidence that any of the smaller firms are inefficiently operated.[1]

---

[7]Pet. Ex. 13, R. Vol. III, p. 16.

[8]Pet. Ex. 13, R. Vol. III, p. 16.

[1]An illustration of such an individual is the appellant, John M. Nichols (Firm No. 9). He handled a relatively small volume. He did practically all the work—selling, yarding and office work (Govt. Ex. 115 B, R. Vol. IV, p. 10). The average gross proceeds per head of the yearling cattle sold by him in 1931 was the highest of any agency and of heavy cattle the second highest (Res. Ex. 249). Manifestly his clients gave him good cattle to sell and he sold them to great advantage. Mr. Nichols has been engaged in livestock marketing more than 30 years. Much of that time he was the head buyer for a large packer—Morris & Company at Kansas City. He drew a very large salary as such a buyer until Morris & Company went out of business when purchased by Armour (Res. Ex. 204). In his case the government accountants included only $78.63 to represent compensation for selling these cattle and $283.08 for yarding the cattle; assigned the rest of his allowed compensation to other expense (Govt. Ex. 115B, Sheet 9, R. Vol. IV, p. 10). The gross proceeds of all livestock this appellant handled in 1931 amounted to $328,040.61 (Res. Ex. 243, col. b and c, R. Vol. III, p. 42), and of cattle alone, $113,172.55 (Res. Ex. 249, col. k, R. Vol. III, p. 43). The application of the Secretary's rates to his business in 1931 would have left nothing to him as return on investment or as compensation for his year's work, but instead would have produced *a net deficit,*

Tested by practical experience, therefore, the rates fail to yield the cost of performing the business as conducted and, so far as the record shows, as required to be conducted.

(3) As to no single agency, large or small, now in business, will the rates prescribed by the Secretary yield reasonable compensation for the services

---

on the basis of the Government's accountants' report which eliminated certain expenditures, amounting to $285.79 (Pet. Ex. No. 4, col. j, R. Vol. III, p. 6). The competency of such a man cannot be questioned. He employed no specialty salesmen to assist him in his work. He had one extra cattle yardman to whom he paid a compensation during the year of $120.74, so it is apparent that he did most of the yarding of cattle himself. He employed two hog yardmen paying a total compensation of $1,144.15. His sheep were sold on a split commission basis. He paid to another firm for furnishing him with office facilities $1,800.00 (Govt. E[illegible] R. Vol. IV, p. 10). He used his own automobile and cha[illegible] up on his books only $76.00 of the year's expense in operating it. He sent out few circular letters and spent only $23.80 for specialties and novelties. Under the rates in effect in 1931, his net profit as return on investment and compensation for personal service was $1,572.62. He sold 15,252 head of livestock, making 1,919 separate transactions of sale for 1,240 owners. He bought 2,331 head of livestock, making during the year 102 separate purchases for 64 owners (Govt. Ex. 114-9, Schedule 3).

The reference to this individual illustrates (1) the confiscatory effect of the order upon an efficient individual operator, (2) one of the reasons why, although the functional unit costs set forth by the Government Accountant in Exhibit 115 varied widely between different agencies, no inference of inefficiency may be drawn from such variances, (3) an instance of individual operations by an appellant, repeated over and over again in the evidence, and (4) the effect upon such an individual of the Secretary's rates if he continues his representation of his clients in the future as in the past upon the same efficient, careful basis. And, until in a finding of evidentiary fact, the Secretary holds definitively that all the operations of such men are inefficient or uneconomic, or points out with certainty the particular expenses of which he complains, these men have had no actual day in court. They are called upon to explain or refute a vague, nebulous and indefinite statement or conclusion of ultimate fact which may or may not relate to them in particular but the result of the application of which is to produce a schedule of rates they are unable to apply and still maintain the status of efficient agents for the livestock producer.

> performed, and as to many they will result in substantial loss. This is particularly true of those firms having the largest volume and receiving for their shippers the highest prices,[1] and of those in which employees perform all of the work other than general management.[2]

All of the ultimate facts stated above were fully supported by the evidence offered by the appellants' accountant in the court below.

The Government made no effort to controvert this showing, which is, on the basis of the Government's accountants' own figures, incontrovertible. On the contrary, its position, as evidenced by its answer, is that it is immaterial whether the rates prescribed would return the out-of-pocket cost of *any* agency conducting business at the yards, for in its answer it averred (VIII, R. 144):

> "Defendants say that it is irrelevant and immaterial to the validity of the Secretary's Order and to this suit whether or not the gross yield of rates and charges prescribed in the Order, if applied in 1931, would have been less than the cost of operation of the business of any one petitioner during that year."

---

[1]See Point I, pp. 54-55, 57, 58, *post*.

[2]Agencies 10, 36, 54 and 12 (Govt. Ex. 115B, R. Vol. IV, pp. 129, 134, 69, 13).

SPECIFICATION OF ERRORS

The Court below erred:

1. In failing and refusing to hold that each and all of the rates prescribed in the Order of the Secretary of Agriculture of June 14, 1933, are confiscatory of the property and livelihood of the appellants and of each of them and in failing and refusing to hold that the enforcement of such rates would deprive the appellants and each of them of their property and livelihood without due process of law and in violation of the Fifth Amendment to the Constitution of the United States.

2. In holding that the findings and Order of the Secretary are supported by the evidence, and in failing to hold and conclude to the contrary.

3. In holding that the findings and Order of the Secretary are supported by substantial or any evidence, and in failing to hold and conclude to the contrary.

4. In holding that the Order of the Secretary and the respective rates fixed thereby are not unjust, unreasonable, arbitrary and in violation of the provisions of the Packers and Stockyards Act.

5. In holding that the Order of the Secretary and the respective rates fixed thereby are not unjust, unreasonable, arbitrary and in violation of the provisions of the Packers and Stockyards Act in the absence of a finding, or evidence to support a finding, by the Secretary of Agriculture of the existence of a monopoly or other restraint destructive of competition.

6. In holding that the conclusions and estimates of the Secretary of Agriculture as to the amount of livestock of the different species that an individual livestock salesman ought to be able to sell efficiently in a year were supported by substantial evidence; and in failing to find and hold that these conclusions were contrary to the evidence and were unrelated to the actual past performance of any appellant.

7. In holding that the Order of the Secretary of Agriculture is valid and not in violation of the Packers and Stockyards Act of 1921, and in failing to hold and conclude to the contrary.

8. In failing and refusing to hold that the Order of the Secretary is arbitrary, unreasonable and in excess of his power and authority under the Packers and Stockyards Act of 1921 in that it fails to relate the allowance for business-getting and maintaining expenses to the amounts actually expended by any appellant during the test periods for these purposes.

9. In not holding that the action of the Secretary in refusing to give consideration to the evidence as to the reasonable value of the personal services of the owners of the respective businesses of appellants was arbitrary and unreasonable.

10. In not holding that the findings and Order of the Secretary are illegal and void by reason of the arbitrary and capricious manner and method employed in preparing the functional cost tables and in calculating the various components of the rates in his said findings, in that, among

other things, he arbitrarily and capriciously ignored and eliminated therefrom numerous salary and non-salary items of cost.

11. In failing and refusing to hold that the Secretary exceeded the power and authority conferred upon him by the Packers and Stockyards Act of 1921 in that the maximum rates fixed by the Order are unjust, unreasonable, arbitrary, invalid and illegal because of the employment in the formulation of said rates of hypothetical costs in the place of actual costs of typical market agencies.

12. In failing and refusing to hold that the Secretary acted illegally in ignoring and discarding expenses incurred by appellants and not covering them into the maximum rates, although no finding was made or could have been made on the evidence that any of said expenses were wasteful, extravagant or unnecessarily incurred.

13. In not finding that the Secretary, by the methods of rate making employed in the formulation of his Order, unduly and illegally invaded the right of management and of freedom of ownership of the property of the appellants and of each of them.

14. In not holding the actions of the Secretary to have been arbitrary, capricious and violative of due process of law in that he based his findings of evidentiary fact as to costs upon his own untrammeled judgment and not upon the evidence, thereby denying appellants the opportunity to test, explain or refute the same.

15. In sustaining the motion of the Secretary to strike Section IV of the petitions of the appellants.

16. In failing and refusing to give appellants an independent review of both the facts and the law and to weigh the evidence.

17. In failing to accord due and proper weight to the evidence, and in failing to hold that the conclusions and findings of the Secretary are unsupported by any substantial evidence and are contrary to the facts established by the evidence.

18. In failing and refusing to hold that the Order of the Secretary of Agriculture was invalid, illegal and made without jurisdiction because made in the absence of evidence to support a finding by him that the existing rates were unjust or unreasonable.

19. In failing and refusing to hold that the administrative proceedings were irregular and not in conformity with the statute, and that they denied appellants and each of them due process of law because appellants were denied individual hearings, full hearings, hearings upon tentative orders, and any hearing at all before the Secretary of Agriculture himself.

20. In failing and refusing to hold that the Secretary of Agriculture exceeded the power and authority conferred upon him by the Packers and Stockyards Act of 1921 in employing, in the formulation of the maximum rates, hypothetical costs which were less than the actual costs of any typical agency, and which were based upon assumed conditions which the Secretary of Agriculture expected might exist at some future time rather than upon the actual experience of the appellants, or some of them, as market agencies.

SUMMARY OF ARGUMENT

POINT I—The ruinous effect of the rates upon the business of the appellants, severally and collectively, demonstrates that the order is arbitrary or confiscatory or both and should be set aside irrespective of the propriety of allowances for particular components of the rate.

POINT II—The order is arbitrary and based upon a misconception of the powers and duties of the Secretary, upon a departure from settled and recognized standards, both of reasonableness and of administrative authority, and upon an interpretation of the powers of the Secretary which, if correct, would give rise to a serious constitutional question as to its validity, which should be avoided.

POINT III—The findings and order contained no legally sufficient finding that the existing rates are unreasonably high.

POINT IV—The Secretary's allowance for salesmen's services is based wholly on speculation and hypothesis, is arbitrary and capricious, unsupported by evidence, and based upon an erroneous conception of the law and of the Secretary's powers.

POINT V—The allowance for business-getting and maintaining expense is based upon speculation and hypothesis, is arbitrary and capricious, and is not supported by evidence or finding.

POINT VI—The allowances and findings for yarding and office salary costs are invalid because based upon arbitrary, unsound and capricious functional cost allocations.

POINT VII—The administrative proceedings were irregular, not in conformity with the statute, and denied appellants due process.

ARGUMENT.

POINT I.

THE RUINOUS EFFECT OF THE RATES UPON THE BUSINESS OF THE APPELLANTS, SEVERALLY AND COLLECTIVELY, DEMONSTRATES THAT THE ORDER IS ARBITRARY OR CONFISCATORY OR BOTH AND SHOULD BE SET ASIDE IRRESPECTIVE OF THE PROPRIETY OF ALLOWANCES FOR PARTICULAR COMPONENTS OF THE RATE.

1. The ruinous and confiscatory character of the rates is properly pleaded individually and with particularity as to each apellant and in effect conceded by appellee's answer.

Fifty separate, individual petitions in equity were filed in the court below in this proceeding. The cases were consolidated in the court below for trial and all further proceedings, without prejudice, however, to the right of the appellants and to each of them to several and individual presentation, consideration and determination of the issues in each of the fifty causes which are several in character and individual to each separate action (R. 163-164). But one case has been docketed in this Court on appeal, since the court below entered a joint decree in the cases as consolidated (R. 166-168).

Only the petition in equity in the *Morgan* case appears *in extenso* in the record (R. 1-122), but the parties have stipulated in the record (R. 130-B) that the petitions in equity in all the remaining cases are identical with that in the *Morgan* case, except for the name of the plaintiff or

plaintiffs and the amounts set up in the allegations respecting confiscation and the ruinous character of the rates as applied to each appellant severally and individually.

The petition in the *Morgan* case in paragraph VII thereof makes specific allegations in respect of the failure and refusal of the Secretary to make proper allowances for proper costs and expenses of the business (R. 13-18). Paragraph VIII thereof expressly alleges that the challenged rates are confiscatory as to the appellant; that the gross revenue yield of the challenged rates as applied to the business of the appellant for the year 1931 would be less in a stated amount, than the costs of the appellant for that year on the basis of the cost evidence of the accountant for the appellant, and less in amount than the appellant's total costs of operation recognized by the accountant for the Government; and that the challenged rates would be individually and severally confiscatory in respect of each species and weight of livestock involved. There are further allegations as to the aggregate effect of the rates upon all the appellants, upon the most efficient appellants and upon the cooperative agencies (R. 18-20). The record shows that each appellant in his petition made precisely the same particular allegations as to himself or itself, excepting that the particular amounts differed. These particular amounts as to each appellant as alleged in his petition are set out *in extenso* in the stipulation appearing in the record at R. 130-B.

The pleadings of the appellants, therefore, are not subject to the objection that they are based upon mere allegation of aggregate effect upon all;[1] and they fully comply

[1]See *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 448.

with the requirements respecting specification and particularity.[2]

The Government filed a joint answer to all of the petitions. In respect of paragraph VIII of the petitions, which, as stated, contains the particular allegations as to ruinous and confiscatory effect, the answer, while denying this upon information and belief, further avers:

> "that none of the facts alleged therein is relevant or material to the validity of the Secretary's Order, or to this suit, and that the lawfulness of the rates and charges prescribed in said Order is not to be determined by whether or not each petitioner could earn a sufficient amount thereunder to cover costs as high as those heretofore incurred." (R. 144).

and further

> "Defendants say that it is irrelevant and immaterial to the validity of the Secretary's Order and to this suit whether or not the gross yield of rates and charges prescribed in the Order, if applied in 1931, would have been less than the cost of operation of the business of *any one* petitioner during that year." (R. 144. Italics added.)

Again, in answering paragraph VII of the petitions, which challenged the legality and sufficiency of the allowances for particular items contained in the rate order, the answer avers:

> "Defendants admit that the reasonable unit costs found by the Secretary are lower in most instances than those costs actually incurred by petitioner market agencies, and defendants say that the purpose of the inquiry was not to construct a rate order

---

[2] *Public Service Commission* v. *Great Northern Utilities Co.*, 289 U. S. 130, 136, 137; *Beaumont, S. L. & W. Ry.* v. *U. S.*, 282 U. S. 74, 88, 89.

based upon costs actually incurred in maintaining an overly-competitive market, but rather to determine what costs are reasonable." (R. 142).

In view of these averments of the answer and of the absence of any finding by the Secretary that the rates would be compensatory as to any appellant, and in view of the failure of the appellees to introduce any evidence in the court below to show that they would be compensatory,—although appellants introduced evidence to show that they would be confiscatory and ruinous as to each of them—it can fairly be taken as admitted that the rates are ruinous and confiscatory as to each and every appellant individually.

2. There is no finding either by the Secretary or by the court that the rates would not be confiscatory or would be compensatory as to any appellant; and the court below has in substance found that they are confiscatory.

The Secretary made no finding as to the effect of the rates upon the business of the appellants or any of them. The majority of the court below in its original opinion concluded that on the issue of confiscation the order of the Secretary was sustained by the weight of the evidence[1] (R. 152), but upon rehearing the majority of the court pointed

[1]The Court did not, however, make any specific findings on the issue of confiscation as to any of the petitioners and its general conclusion was obviously influenced by the view that it was without authority to disturb the findings of the Secretary (R. 152), apparently on the theory expressed in the concurring opinion of Judge Van Valkenburgh that the Secretary is given by the statute "almost dictatorial power" (R. 157). Indeed, on no other theory could the court below, in the light of the undisputed facts, have held as it did (R. 152) that "the rates and charges fixed by the Secretary's order adequately provide for costs and for a return on invested capital and for profits as to all petitioners who have shown that their agencies are efficiently conducted."

out that the Secretary's order was not based upon actual experience but upon "hypothetical costs based not upon present, but upon assumed conditions which he expects may exist at some future time"; that "the drastic reduction of advertising and other costs, essential to getting and maintaining business, gives scant consideration to the reasonable necessities of the situation as disclosed by experience"; and that the court feared that "the effect of these methods employed may, as suggested by petitioners, tend to weaken, and ultimately to destroy, this market by diverting business to other more favored markets and agencies, and may tend further to the undue restriction of agencies enabled to operate profitably" (R. 165, 166). Although the majority of the court nevertheless concurred in a dismissal of the bills (having an erroneous view as to the judicial authority),[2] we think it fair to say that the final conclusion of the majority of the court, on rehearing, upon the issue of the effect of these rates upon the appellants, in so far as the record discloses any conclusion upon that question, is that they are ruinous and confiscatory. We do not perceive how any other conclusion could have been reached on the pleadings or the evidence, especially the uncontradicted evidence now to be mentioned.

3. The ruinous and confiscatory effect of the rates as to all of the appellants, severally and collectively, is established by all of the evidence of record upon the point, which is undisputed.

The only new evidence introduced in the Court below was that of the appellants' accountant, Roberts, who intro-

---

[2]*Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 335; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289; *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43; *Crowell* v. *Benson*, 285 U. S. 22, 46, 56-57, 60.

duced thirteen tabulations which appear in the printed volume of original exhibits exemplifying the ruinous and confiscatory effect of the rates upon the appellants and all of them. From this evidence it appears:

A. AGGREGATE NET OWNERS RETURN ON BASIS OF PRESCRIBED RATES TO 61 FIRMS DOING BUSINESS IN 1931.

Petitioner's Exhibit No. 4 (R. Vol. III, p. 5, 6) shows the effect of the prescribed rates upon each of the 61 individual firms doing business in 1931 and gives aggregate figures for the 61 firms combined. This exhibit, as in the case of the other Roberts exhibits to be referred to, is not a new accounting study but merely an application of the new rates to the 1931 volume of business of the firms (as that volume is established by the Government's own accounting witnesses), and a comparison of the returns to the agencies and owners, so reached, with the realized cost for *1931* as found by the Government's own accountants.[1] For this purpose there were excluded from the aggregate costs so found the amounts allowed therein as compensation for owners, in order to make a true comparison, as to each agency and in the aggregate, between revenue under the Secretary's rates, and the amount left, if any, after paying expenses, for owner's compensation. The amounts so eliminated are shown

[1]In applying the Secretary's rates to the volume of business of each of the firms, in 1931 as established by the Government's own accountant, the actual revenues from order buying and from "seconds" were used instead of the Secretary's rates, since only the regular selling rates are under attack and both the buying rates and the selling rates on "seconds," as fixed by the Secretary, are believed to be higher than the traffic will bear. The adjustments so made (Pet. Ex. 4, col. h, R. Vol. III, pp. 5-6) are, however, inconsequential in amount, either in the aggregate or as applied to particular agencies (compare Col. G and H, Pet. Ex. 4, *supra*) and their elimination or inclusion does not substantially affect the figures hereinafter set forth.

in respect of each of the several species under Column C (Pet. Ex. 4, R. Vol. III, pp. 5-6) and the resulting out-of-pocket costs, exclusive of owners' compensation, in Column D.

For the sixty-one firms, the prescribed rates will yield an aggregate net return, before any compensation to owners for management, personal service or return on the investment, of $78,125.09 (Pet. Ex. 4, Vol. III, p. 6, Col. J). The Secretary allowed as return on the investment $54,394.81 (Pet. Ex. 4, R. Vol. III, p. 6, Col. K). Deducting this from the aggregate net revenue leaves $23,730.28, equal to $174.50 per year (Pet. Ex. 4, R. Vol. III, p. 6, Col. N), or forty-eight cents per day, for each of the one hundred thirty-six owners, a return clearly confiscatory, ruinous and wholly unreasonable.[2]

B. Return on basis of prescribed rates to the 11 firms doing 50% of the selling business.

The report of the Secretary finds that 11 firms handled over 50% of the business and received over 50% of the revenues for the years 1929 and 1931 (FF. 86, 88, R. 68-71, 71-73). According to tabulations made by the witness Roberts upon the same basis as the aggregate return figures just discussed, it appears that the selling rates prescribed by the challenged order of the Secretary when applied to the aggregate operations of these eleven firms for the year 1931 will yield only $7,920.37 for return on investment and

[2]If revenues from buying and from selling "seconds" had been included at the Secretary's rates instead of those actually in effect (see footnote preceding page) the net return would have been increased by $47,430.27, equivalent to $348 per annum per owner, or less than $1 per day, thus establishing the inconsequential effect of using the Secretary's rates or the old rates for these particular services.

compensation to owners. When the Secretary's allowance of $28,560.65 for return on investment is deducted, the prescribed rates give a deficit of $20,640.28 before any compensation to owners.[3]

C. Effect of prescribed rates on revenues of 23 firms doing more than 75% of the business and securing more than 75% of the total market revenue.

A further calculation introduced by the witness Roberts relating to the 23 firms which, as found by the Secretary, did more than 75% of the business (R. 69-71) shows that the application of the prescribed rates to the 1931 business of these firms would yield only $25,025.38 for the firms as an aggregate for return on investment and compensation to owners. When the Secretary's allowance of $40,552.32 for return on investment for these 23 firms is deducted, the prescribed rates give a deficit of $15,526.94 before any compensation to owners.[4]

D. Individual net Owner Return on Basis of Prescribed Rates.

From undisputed evidence consisting of exhibits of the witness Roberts and from other undisputed evidence contained in the record, the appellants have prepared the table which appears on the following page which shows, as to each agency now in business and on the basis of the business for 1931, the amount of income per owner or loss per agency which would be realized or sustained under the challenged rate, the volume handled by the firm and the number of owners.

---

[3]Pet. Ex. 13, R. Vol. III, p. 16.
[4]Pet. Ex. 13, R. Vol. III, p. 16.

OWNERS' COMPENSATION UNDER SECRETARY'S RATES FOR FIRMS NOW DOING BUSINESS ON KANSAS CITY MARKET

This table shows the amounts, if any, available as compensation to owners of firms presently engaged in selling on commission at the Kansas City market, obtained by applying the Secretary's rates to the volume of business actually handled in 1931. The first column of figures showing the total value of livestock bought and sold is included in order to reveal the absence of relationship between volume handled and net yield per firm or per owner.

Firm No.	Name of Firm	Total Value of Livestock Bought & Sold (Res. Ex. 243, R. Vol. III, p. 42)	Net Yield to Firms Available for Owners' Compensation* (Pet. Ex. 4, R. Vol. III, p. 6)	Number of Owners (Pet. Ex. 4, R. Vol. III, p. 6)	Compensation per Owner (Pet. Ex. 4, R. Vol. III, p. 6)
44	W. M. Leitch Sheep Commission Company	$1,324,984.46	$ 8,495.29	2	$4,247.65
83	Burlington Livestock Commission Company	5,656,574.78	20,403.72	5	4,080.74
43	Knight & Tice Sheep Commission Company	527,105.48	2,860.39	1	2,860.39
18	Haggart-Wilson Livestock Commission Company	2,870,100.80	8,964.65	4	2,241.16
55	Wright and Baucus	2,870,335.76	4,445.06	2	2,222.53
42	Long-Perry Livestock Commission Company	2,616,731.66	6,308.19	3	2,102.73
48	Poole-Dempsey-Rutherford Commission Company	1,968,143.19	6,195.29	3	2,065.10
15	Elliott, Swain & Company	772,168.09	4,065.85	2	2,032.93
7	Maxwell-Furnish Livestock Commission Company	1,117,496.76	3,801.67	2	1,900.84
17	Gladish Livestock Commission Company	523,375.34	3,159.60	2	1,579.80
34	Warren Cummings Livestock Commission Company	3,949,562.56	1,564.32	1	1,564.32
16	Farrar, Davis & Campbell	1,194,216.00	4,523.71	3	1,507.90
6	Lewis and Flournoy	751,686.98	2,985.94	2	1,492.97
76	Greer & Company	721,572.70	1,443.47	1	1,443.47
30	Tamblyn Commission Company	1,067,029.08	2,481.16	2	1,240.58
46	National Livestock Commission Company	8,115,270.20	5,620.92	5	1,124.18
77	Inman-Hutton Livestock Commission Company	1,091,727.95	3,307.75	3	1,102.58
53	Ehrke-Martin Livestock Commission Company	1,794,498.87	2,164.08	2	1,082.04
84	Cassidy-Southwestern Commission Company	3,564,942.66	2,844.93	3	948.31
60	H. Theis & Sons	1,057,248.14	3,745.13	6	624.19
23	F. O. Sanders Livestock Commission Company	1,827,059.89	506.01	1	506.01
61	Ham Knighton Livestock Commission Company	375,221.66	382.78	1	382.78
26	Wester Bros. & Smith Commission Company	1,449,650.61	271.80	2	135.90
13	Crider Bros. Commission Company	2,830,142.29	85.12	3	28.37
29	Stagner, Peirronet & Willis Commission Co.	1,164,881.95	82.76	3	27.59
82	Wilson-Egan & Co.	5,245,885.21	101.09	5	20.22
14	Chas. Dixon Commission Company	2,078,889.33	170.87**	3	
9	John M. Nichols Livestock Commission Co.	328,040.61	468.24**	1	
63	Martin, Blomquist & Lee Commission Company	8,600,811 51	740.20**	7	
75	W. E. Curtis & Company	1,235,468.91	1,042.83**	1	
62	Laird Bros. Commission Company	1,415,170.40	1,221.39**	2	
20	Kansas City Livestock Commission Company	1,439,986.96	2,325.36**	1	
65	Moffett Commission Company	1,807,585.09	2,365.17**	2	
70	Kile Commission Company	2,355,234.93	2,384.22**	1	
25	Stuart-Robinson-Hoover Company	2,679,869.04	2,607.34**	2	
59	Swift & Henry Livestock Commission Company	10,226,699.02	2,676.99**	4	
71	Ryan-Robinson Commission Company	3,365,689.02	3,776.86**	5	
4	Ragland-Storts & Company	1,803,902.69	3,998.09**	2	
73	Witherspoon Livestock Commission Company	3,551,657.52	6,171.41**	4	
54	John Clay & Company	12,267,430.93	8,668.17**	3	
12	Bowles Livestock Commission Company	3,175,243.62	12,370.51**	—	
36	Farmers Union Livestock Commission Company		16,818.54**	—	
10	Producers Commission Association		25,631.41**	—	

*These figures are obtained by deducting from each firm's total revenue under the Secretary's rates its costs for 1931 as found by the Government's accountants (exclusive of the allowance made by those accountants for owners' compensation) and the return on investment allowed by the Secretary.

**Indicates deficit.

The net owner income referred to in this table is inclusive of all services of owners. The record shows, as previously pointed out, that practically all owners are actively engaged in the business, mainly in salesmanship and management and incidentally doing yarding and office work.

The results thus appearing may be summarized as follows:

(1) Of the 43 firms now in business in respect of which it was possible to make the calculation and which are all included in the tabulation, it appears that 17 would realize no owner income, but, on the contrary, would sustain losses ranging from $25,000 down to $170.87. In respect of these 17 firms, there can be no contention that they are the marginal companies. On the contrary, they include the largest firms in the business, John Clay & Company (Agency No. 54) with an annual volume in excess of $12,000,000, Swift & Henry Livestock Commission Company (Agency No. 59) with an annual volume of $10,000,000,[1] and Martin, Blomquist & Lee Commission Company (Agency No. 63) with an annual volume of $8,000,000. Included among these firms showing a loss are the two cooperative companies (Agencies Nos. 10 and 36) which also have very large volumes of business. There is neither finding nor evidence that these agencies or any of them are inefficient or wasteful. On the contrary, they are among the most efficient, both as to sales performance (See Appendix B) and in the results obtained for shippers whose agents they were, as measured by the prices per head received. For the year 1931, the average price realized per head by all firms on yearling cattle ranged from a low of $24.92 to a

[1]These two firms rank respectively first and second in the volume of business done.

high of $42.51, and for heavy cattle from a low of $36.52 to a high of $68.94.[2] The per head realization of these firms, showing a deficit under the Secretary's rates, was as follows:[3]

Agency No.	Yearling Cattle	Heavy Cattle
54	$35.71	$61.06
59	39.57	67.31
9	42.51	68.52
63	36.48	63.91
4	36.39	61.55
75	39.12	62.90
20	34.71	58.21
25	37.12	63.87
12	33.56	57.15
14	33.03	55.33
62	32.68	54.06
65	34.86	57.88
70	35.66	53.14
73	31.45	51.47

It will be observed that the three largest firms suffering a deficit (John Clay & Company—Agency 54, Swift & Henry—Agency 59, and Martin, Blomquist & Lee—Agency 63), rank high in sales realization as they do in sales performance, as will hereinafter appear.

(2) Of the next 24 firms it appears that 8 will receive net income per owner under $1,000; that is, running from $20.22 up to $948.31. The next 10 will receive net owner incomes between $1,000 and $2,000, and the next 6 will receive net owner incomes between $2,000 and $3,000.

---

[2]Res. Ex. 249, R. Vol. III, p. 43.

[3]This information is not contained in the record as to firm No. 71, nor as to the two cooperatives (Nos. 10 and 36), who refused to disclose this information.

When it is borne in mind that these are not returns to non-productive owners but are returns to owners who actively perform the most important functions of the business and devote the whole of their time to it, the confiscatory character of the order is plainly apparent, especially in the light of the Secretary's findings as to what constitutes reasonable salaries for salesmen. The reasonable salaries prescribed by him—$3,000 for a hog salesman, $3,500 for sheep salesman, and $4,000 for a cattle salesman—are in every instance in excess of the amounts to be realized by any of the owner-salesmen in these 24 firms under the challenged rates. There can be no contention that these firms are exclusively marginal firms, for they include one with a volume in excess of $8,000,000, one with a volume in excess of $5,000,000, two with a volume in excess of $3,000,000, four with a volume in excess of $2,000,000, and ten with a volume in excess of $1,000,000.

(3) The two remaining firms (Burlington Live Stock Commission Company—Agency 83—and W. M. Leitch Sheep Commission Company—Agency 44) each show net owner income under the Secretary's rates slightly in excess of $4,000 per annum. The Burlington Live Stock Commission Company, which would receive a calculated net income of $4,080.74 per owner, has principally an order buying business.[2] As previously pointed out, the question in

---

[2]As appears from Government Exhibit 115 pp. 65, 66 (R. Vol. III, pp. 31-34), this company sold 45,799 head of cattle and bought 76,308, its buying operations exceeding its selling operations by almost 50%. The same Exhibit discloses that in respect of all the other agencies engaged in selling, cattle sold exceeded those bought, in no event the cattle bought equaling much more than 50% of those sold and in most instances being much less, and that for all the agencies combined buying amounted to only 22% of total head handled. Moreover, the expense of selling greatly exceeds that of buying, notwith-

this case is the sufficiency of the rates for selling and not those for buying, the buying rates not being under attack.

The other agency (Leitch), which would receive a calculated net owner income of $4,247.65, engaged solely in the business of selling sheep,[3] and a calculation of the return to it is no fair test of the workings of the Secretary's rate schedule as a whole, and no test whatsoever of the rates on either cattle or hogs. The value of the services of the two owners of this agency was conservatively appraised by the respondents' appraisers at $5,000 each.[4] No evidence controverting such appraised value of their services was offered by the Government. This firm handled 267,391 head of sheep, on which the sales realization was $1,324,984.46, the remittance of which it was required to finance by the use of capital or credit, in advance of payment. It is believed that, in view of the foregoing, the Secretary's rates are confiscatory as to the owners of this agency,[5] but if not, the compensation per owner of this exclusive sheep agency is no test of the sufficiency of the Secretary's rates as to other selling agencies, none of which,

---

standing that the Secretary established a uniform rate for both. This is so, among other reasons, because (1) there is substantially no yard expense attributable to buying; (2) comparatively small country contact or appraisal expenses and (3) smaller business getting and maintaining expenses generally (Compare R. 328-333, 358-362, with R. 201-210, 238-239, 1038-1044 and with pp. 15-27, *ante*). Moreover the sales performance of this company, as measured by the headage sold per salesman, is not above the average and is below that of the leading selling firms (Appendix B). The relatively larger, although at the same time modest, returns per owner to this agency are demonstrably not attributable to its selling business but to its buying business, the rates on which are not involved.

[3]Govt. Ex. 115 B, R. Vol. IV, p. 54.

[4]Res. Ex. 204.

[5]Compare the compensation per owner under the rates prescribed in the *Tagg* case (pp. 65-69, *post*).

as disclosed by the foregoing review, has received adequate compensation per owner and many of which, including the largest and most efficient firms, would fail to meet the expense of conducting the business at the Secretary's rates.

4. The evidence in the record as to the ruinous and confiscatory effect of the challenged rates has been confirmed by the event.

As previously pointed out (pp. 13-14, *ante*) nine of the fifty appellants have retired from business since the institution of this suit, and one (Firm No. 37) no longer conducts business in the usual manner. This appears by the affidavits introduced by these firms for the purposes and under the authority discussed at page 14, *ante*. Owner income, or loss per agency, as of the year 1931 at the Secretary's rates for these ten firms is shown by the table on the following page.

It will be observed that, as to all except the first, the Secretary's rates either failed to equal costs actually incurred or afforded wholly inadequate compensation to the owners.

The one firm showing a substantial net yield at the Secretary's rates (Harry Kennaley Commission Company—Agency 51) has also gone out of business since this appeal was taken. The surety for this agency, compelled to make good a default on the agency's bond, has moved by its attorneys to be substituted as a party appellant. It is pointed out in this motion that the agency's failure and default was due to poor management, largely resultant upon its failure to book its costs. Consequently, the accuracy of the assumed net yield may well be doubted. In any event, since this agency is out of business, it is immaterial, upon

OWNERS' COMPENSATION UNDER SECRETARY'S RATES FOR FIRMS NO LONGER DOING BUSINESS ON KANSAS CITY MARKET

This table shows the amounts, if any, which would have been available as compensation to owners of firms which have discontinued business since the beginning of the present suit, obtained by applying the secretary's rates to the volume of business actually handled in 1931.

Firm No.	Firm Name	Total Value of Livestock Bought & Sold (Res. Ex. 243, R. Vol. III, p. 42.)	Net Yield to Firms Available for Owners' Compensation* (Pet. Ex. 4, R. Vol. III, p. 6.)	Number of Owners (Pet. Ex. 4, R. Vol. III, p. 6.)	Compensation per Owner (Pet. Ex. 4, R. Vol. III, p. 6.)
51	Harry Kennaley Commission Company	$2,662,896.02	$11,095.78	1	$11,095.78
66	Jay D. McCormack Commission Company	141,151.17	970.18	1	970.18
79	Les White Livestock Commission Company	447,551.79	714.95	1	714.95
1	Fred O. Morgan Sheep Commission Company..	142,790.80	542.92	1	542.92
33	H. F. Carnes Livestock Commission Company..	87,911.80	403.88	1	403.88
37	Link Fasken Livestock Commission Company..	60,593.51	402.50	1	402.50
5	H. H. Klecker Sheep Commission Company	987,827.74	356.79	1	356.79
72	Welch Commission Company	99,886.35	225.01	1	225.01
78	W. G. Land Livestock Commission Company..	554,617.58	979.97**	1	
35	Drumm-Standish Commission Company	3,198,262.00	1,139.49**	10	

*These figures are obtained by deducting from each firm's total revenue under the Secretary's rates its costs for 1931 as found by the Government's accountants (exclusive of the allowance made by those accountants for owners' compensation) and the return on investment allowed by the Secretary.

**Deficit.

the issue of confiscation as affecting the rates for the future whether the order is confiscatory as to it or not, so far as the other appellants are concerned. Its sole interest, and that of the bonding company, is in the impounded rates. Moreover, the sufficiency of the Secretary's rates cannot be judged by the operations of this firm, which is in no respect typical or representative. This agency was an inconsequential factor in the cattle business, having bought and sold but 22,495 head of cattle and calves[6] on which it had the distinction of having obtained an average price per head of heavy cattle for its growers of $39 a head, as against a low of $37 per head, a high of $68 a head and an average of $60 a head for the agencies as a whole.[7] It was primarily engaged in the sale of hogs, in which it apparently ranked first, having in 1931 sold 159,184 hogs.[8] But as its proprietor testified at the hearing, he had "had the experience of receiving so many hogs in the past three months that I did not give a good many of them the right kind of selling, feeding and handling of them." (R. 578). The favorable showing of this agency, supposing the calculated yield to be correct, was obviously made at the expense of its clients. The correctness of the calculated yield is cast in doubt by the agency's subsequent default on its obligations and its failure to book costs, as is evidenced by the motion of its surety.

---

[6]Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34.
[7]Res. Ex. 249, R. Vol. III, p. 43.
[8]Govt. Ex. 115, p. 9, R. Vol. III.

5. Yield of the rates as shown by the evidence in this record is in decided contrast to the yield of the rates as shown in the *Tagg* case by similar evidence in that record.

In contrast with the patently ruinous and confiscatory effect of the challenged rates in this proceeding upon the business of all of the market agencies at the Kansas City stockyards are the rates sustained by this Court in the *Tagg* case.

In that case the Secretary based his rates not on any mere theoretical estimation, but on actual experience as disclosed by the evidence.[1] In the record in that case there appeared exhibits drawn upon the same plan as those of the witness Roberts heretofore referred to herein, showing the calculated yield of the challenged rates based upon the business and costs of the test year. The table from the Tagg Brothers record is set out upon the opposite page.[2] It shows that the owners sustaining a loss are a very decided minority, 18 out of 130; that about half of the owners received a compensation in excess of $3,000, going up from that figure to a high of $13,450 per annum.

---

[1] 29 F. (2d) 750.

[2] This court will take notice of the records of cases in this court. *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336.

TAGG BROS. & MOORHEAD *v.* UNITED STATES

EXHIBIT 123-A (Record, pp. 824-827)

SCHEDULE OF EARNINGS INDIVIDUAL OWNERS UNDER SECRETARY'S ORDER EXCLUDING INCREASE TO SPECULATORS AND INTEREST ON INVESTMENT

OMAHA LIVE STOCK EXCHANGE, OMAHA, NEBRASKA

INCOME TO OWNERS, YEAR 1925

This schedule is compiled using the income that would have been received if the Secretary of Agriculture's Order had been in effect excepting that portion that allowed for an increase in Dealers & Speculators Commissions, and using the adjusted expense as shown in Schedule 2, except the actual owners' salaries are used in place of the 5-5 and 4 basis.

Owner	Firm	Income per owner
Thos. H. Lindley	Lindley-Cahow Commission Co.	$13,450.98
W. F. Bavinger	Cox-Jones Commission Co.	13,064.90
E. W. Cahow	Lindley-Cahow Commission Co.	12,809.15
W. T. Cox	Cox-Jones Commission Co.	11,932.45
D. C. Johnson	Mutual Live Stock Commission Co.	10,586.75
J. T. Sullivan	Mutual Live Stock Commission Co.	10,586.74
W. W. Buchanan	Alex G. Buchanan & Son	9,439.30
W. Davidson	Mutual Live Stock Commission Co.	9,058.59
L. Jones	Mutual Live Stock Commission Co.	9,058.58
A. E. Rogers	Omaha Live Stock Commission Co.	8,773.79
C. F. Cox	Inter-State Live Stock Commission Co.	8,351.07
R. Reynolds	Inter-State Live Stock Commission Co.	8,351.07
H. H. Roberts	Roberts Bros. & Rose	8,187.44
Joe McClenaghan	Record Live Stock Commission Co.	7,562.75
R. M. Laverty	Laverty Bros.	7,414.70
E. A. Rose	Roberts Bros. & Rose	7,287.44
C. L. Peterson	Great Western Commission Co.	7,161.73
J. A. Alsworth	Great Western Commission Co.	7,161.73
A. W. Tagg	Tagg Bros. & Moorhead	6,971.42
W. C. Lyman	Tagg Bros. & Moorhead	6,971.42
Cliff McClenaghan	Record Live Stock Commission Co.	6,962.76
W. F. Denny	W. F. Denny & Co.	6,848.89
John Smith	Wm. R. Smith & Co.	6,847.09
W. B. Tagg	Tagg Bros. & Moorhead	6,645.86

Owner	Firm	Income per owner
A. E. Anderson	Tagg Bros. & Moorhead	$6,371.42
M. C. Wilkerson	Tagg Bros. & Moorhead	6,371.42
T. J. Donahue	Donahue Bros., Inc.	5,957.18
C. W. Allyn	Lindley-Cahow Commission Co.	5,321.31
N. R. Bryson	Bryson Bros.	5,235.86
Chas. Burke	Burke-Rickly Co.	5,067.20
James J. Donahue	Inter-State Live Stock Commission Co.	4,983.68
Lou Bick	Lou Bick Commission Co.	4,889.27
A. J. Adams	Lou Bick Commission Co.	4,889.27
H. W. Johnson	Tagg Bros. & Moorhead	4,871.42
Allen H. Dudley	Allen Dudley & Co.	4,715.57
L. J. Hough	Omaha Live Stock Commission Co.	4,564.17
T. J. Bryson	Bryson Bros.	4,490.57
Geo. E. Martin	Martin Bros. & Co.	4,383.25
M. F. Guilfoyle	Corn Belt Commission Co.	4,326.64
Clyde Kells	Fonda-Kells & Christie Co.	4,321.99
A. J. Randall	Randall & Co.	4,135.71
Chester P. Dudley	Allen Dudley & Co.	4,114.57
E. C. Johnson	Wood Bros.	4,066.07
Webster Mills	Burke-Rickly Co.	3,800.39
E. H. Burke	Burke-Rickly Co.	3,800.39
E. W. Boetel	Boetel Live Stock Commission Co.	3,749.86
G. W. Greene	Greene-Madden & Co.	3,740.85
W. Madden	Greene-Madden & Co.	3,740.85
B. F. Roth	Wood Bros.	3,632.15
J. Boetel	Great Western Commission Co.	3,585.04
H. W. Moberly	Lee Live Stock Commission Co.	3,506.27
Geo. E. Parker	Triangle Live Stock Commission Co.	3,483.35
C. J. Horn	Triangle Live Stock Commission Co.	3,483.35
John O. Willison	Triangle Live Stock Commission Co.	3,483.34
Frank Dworak	Dworak-Stolinski Commission Co.	3,214.24
F. J. Stolinski	Dworak-Stolinski Commission Co.	3,214.23
J. C. Christie	Fonda-Kells & Christie Co.	3,196.99
E. J. Wright	Tagg Bros. & Moorhead	3,161.45
John Fitz Roberts	Roberts Bros. & Rose	3,087.45
Will H. Woods	Wood-Oswald Co.	3,076.74
James Martin	Martin Bros. & Co.	3,014.54
John Martin	Martin Bros. & Co.	3,014.53
E. J. Clifton	Clifton Commission Co.	2,913.37

Owner	Firm	Income per owner
Chas. Hammer	Donahue Bros., Inc.	$2,872.04
H. A. Hough	Omaha Live Stock Commission Co.	2,771.39
E. Munson	Wood Bros.	2,764.29
Frank E. Bliss	Bliss & Son	2,751.28
J. C. Cunningham	Security Live Stock Commission Co.	2,731.61
Wm. H. McAdams	McAdams Bros. & Ihnen	2,655.58
Robert Ihnen	McAdams Bros. & Ihnen	2,655.57
R. H. Fonda, Jr.	Fonda-Kells & Christie Co.	2,643.98
Claude Clifton	Clifton Commission Co.	2,613.36
M. S. Morrill	Great Western Commission Co.	2,585.08
F. C. Bliss	Bliss, Wellman & Hopkins	2,537.77
F. A. Wellman	Bliss, Wellman & Hopkins	2,537.77
E. H. Hopkins	Bliss, Wellman & Hopkins	2,537.76
Mr. Gant	Gant Live Stock Commission Co.	2,514.47
J. R. McPhail	Inter-State Live Stock Commission Co.	2,500.00
Robt. A. Gross	Randall & Co.	2,273.03
Byron Clow	Byron Clow Co.	2,259.02
Mat Malone	Snyder-Malone-Coffman Co.	2,070.05
John J. Robb	Randall & Co.	2,067.85
F. W. Farris	Farris-Marcy Co.	2,011.78
Oscar Allen	Synder-Malone-Coffman Co.	1,890.02
W. W. Rapp	Lee Live Stock Commission Co.	1,881.59
T. B. McEntee	Randall & Co.	1,862.68
J. N. Laird, Sr.	Laird Live Stock Commission Co.	1,792.18
F. M. Young	Byron-Clow Co.	1,753.00
Eugene P. Melady	Melady Bros.	1,637.94
G. J. Ingwerson	Ingwerson-Daugherty	1,621.20
R. B. Daugherty	Ingwerson-Daugherty	1,596.20
J. N. Williams	Williams & Son	1,558.76
L. E. Williams	Williams & Son	1,558.76
Leo Ryan	Donahue Bros., Inc.	1,511.89
P. H. Winn	Winn Bros.	1,501.29
J. P. Winn	Winn Bros.	1,501.29
Henry Dolezal	Globe Live Stock Commission Co.	1,372.99
Frank G. Roberts	Geo. M. Woods Sheep Commission Co.	1,303.14
H. J. Oswald	Wood-Oswald Co.	1,076.74
Samuel Coffman	Central Live Stock Commission Co.	1,052.15
B. Ward	Ward-Murphy Live Stock Com. Co.	1,018.40
M. J. Murphy	Ward-Murphy Live Stock Com. Co.	1,018.40

Owner	Firm	Income per owner
John Ralston	John Ralston Commission Co.	$609.75
S. R. Cox	Cox-Jones Commission Co.	600.00
W. J. Dearth	Geo. M. Woods Sheep Commission Co.	525.24
Brad Hickox	Martin Bros. & Co.	497.45
A. D. Majors	Martin Bros. & Co.	397.45
M. S. Burmeister	Martin Bros. & Co.	372.65
R. M. Burnes	Martin Bros. & Co.	314.70
H. G. Kiddoo	Byers Bros. & Co.	41.14
M. G. Sherman	Byers Bros. & Co.	24.68
968 Other Shares of Stock	Byers Bros. Co.	1,991.53
Books Sent to Chicago	Chas. O. Robinson & Co.	17,544.96*
5 Partners & 2 Co-partners	John Clay & Co.	6,664.11*
Chas. Wood	Wood Bros.	5,641.04*
A. Wertheimer	Rosenbaum Bros. & Co.	5,164.52*
E. H. Ingwersen	Rosenbaum Bros. & Co.	4,766.48*
A. A. Daly	L. E. Roberts & Co.	2,828.55*
Jacob Jacobs	Jacob Jacobs Live Stock Com. Co.	2,839.45*
T. A. Jackson	Jackson Live Stock Commission Co.	2,267.75*
J. H. Ingwersen	Rosenbaum Bros. & Co.	2,015.42*
D. C. Mosier	Rosenbaum Bros. & Co.	1,511.57*
H. K. Wertheimer	Rosenbaum Bros. & Co.	1,007.71*
D. R. Ingwersen	Rosenbaum Bros. & Co.	629.82*
A. B. Moorhead	Tagg Bros. & Moorhead	242.44*
J. R. Eastes	W. R. Smith & Co.	152.91*
A. C. Borroff	Rosenbaum Bros. & Co.	10.08*
C. J. Ingwersen	Rosenbaum Bros. & Co.	5.04*
E. G. Smith	Rosenbaum Bros. & Co.	5.04*
Wm. Frazier	Frazier-Johnson Co.	2.25*

[*Red in copy.]

SUMMARY

No. of owners			Total income
2	From $13,000.00 to	$14,000.00	$26,515.88
1	12,000.00	13,000.00	12,809.15
1	11,000.00	12,000.00	11,932.45
2	10,000.00	11,000.00	21,173.49
3	9,000.00	10,000.00	27,556.47
4	8,000.00	9,000.00	33,663.37
5	7,000.00	8,000.00	36,588.35
8	6,000.00	7,000.00	53,990.28
4	5,000.00	6,000.00	21,581.55
13	4,000.00	5,000.00	58,753.18
19	3,000.00	4,000.00	64,986.01
21	2,000.00	3,000.00	53,267.05
19	1,000.00	2,000.00	28,508.62
9	Less than $1,000.00		3,383.06
	968 Shares of Stock, Byers Bros & Co.		1,991.53
	5 Partners, 2 Co-Partners, John Clay & Co.		6,664.11*
	Chas. O. Robinson & Co., books sent to Chicago		17,544.96*
16	Loss		29,090.07*
	Total Number of Owners—127.		
18	Owners with an Average Income of		$9,457.73
44	Owners with an Average Income of		4,529.80
49	Owners with an Average Income of		1,737.93
16	Owners with an Average Loss of		1,818.13*

[*Red in copy.]

6. The order should be enjoined because confiscatory.

By all of the uncontradicted evidence of record, by what is in substance a finding by the Court below, by what is in substance an admission in the answers of the appellees, by the complete silence of the Secretary's findings upon the point, and by actual driving of one-fifth of the appellants out of business since the rates took effect—in all of these conclusive ways the record establishes not merely the non-compensatory, not merely the confiscatory, but the absolutely ruinous effect of these rates as to every market agency doing business at the Kansas City stockyards. This appears whether the question be regarded from the standpoint of the aggregate return to all the companies, of the aggregate return to the companies with the most volume in head or in dollars, of the aggregate return to those companies which have been longest in the business or to those which are most efficient judged by the matter of returns to customers, or whether regarded from the standpoint of each and every appellant individually.

Upon settled principles a rate order having such an effect is clearly confiscatory and void and should be enjoined.

Board of Public Utility Commissioners v. *New York Telephone Co.*, 271 U. S. 23, 31;
Smyth v. *Ames*, 169 U. S. 466. 547;
McCardle v. *Indianapolis Water Co.*, 272 U. S. 400, 408-409.

7. Order not based on any evidence of waste or inefficiency in the conduct of the businesses upon a competitive basis.

The Secretary finds (finding 129, R. 90) that "There are more firms and a larger personnel on the Kansas City

market than are necessary to dispose of the shippers' livestock effectively. A smaller number of firms than are now engaged could handle the business more economically." Again, (FF. 130, R. 90) "Moreover, the unit costs of many of the firms are high because the volume of business coming to the market is divided among too many firms and handled by an unnecessarily large personnel."

These generalizations can in no sense be regarded as findings that all of the appellants or that any particular appellants are conducting their businesses wastefully or inefficiently in a competitive system. Certainly, they cannot justify a rate order which, to take one example out of a number that could be cited, would turn a profit into a $8,668 per annum loss in the case of one of the oldest companies in the business (John Clay & Company) which handles the largest volume at the Kansas City market, equal to almost 10% of the total volume of all of the companies.[1]

It is unnecessary to multiply examples. It is patent that there is in these findings no definite finding of inefficiency in a competitive system as to the appellants generally or as to any of them. If these findings should be regarded as having that meaning, then they would be wholly unsupported by any evidence. What the quoted findings mean is patent, *i.e.*, that the Secretary regards the competitive system itself as uneconomic and wasteful. Such a finding, of course, is *ultra vires* the Secretary under the statute, as will be discussed in a subsequent subhead.

---

[1]The gross value of the sales and purchases of John Clay and Company for all species in 1931 amounted to $12,267,430.93, which is 9.87% of the $125,362,223.97 total value of sales and purchases of all agencies other than two cooperatives and one small firm for which these figures were not available (Res. Ex. 243, R. Vol. III, p. 42).

Searching the findings from end to end, the only finding that could be regarded as asserting that, as competitive businesses, the appellant firms were being operated inefficiently and wastefully is finding 113 which amounts to nothing more than a vague statement that the "general impression gained from the record" is that the appellants attempted to maintain salaries and personnel in the face of the depression.[2]

This finding is so vague and indefinite as to be wholly without weight. Moreover, if regarded as a finding that the rates of the appellants should be cut because they were unreasonably high by reason of the fact that they were attempting to maintain pre-depression salaries and personnel, then it is wholly unsupported by any evidence. The record is replete with uncontradicted evidence that appel-

---

[2]"113. Notwithstanding the unfavorable business conditions and lowered receipts in 1931, as compared with 1929, few of respondent firms operating in both of those years showed any substantial reduction of personnel in the former as compared with the latter. Also, few firms made any substantial reduction in salaries and wages sufficiently early in the year 1931 materially to affect their cost of doing business as shown in the audits covering that year. Such decreases as were made took place largely in the latter part of the year 1931 and in the year 1932. The general impression gained from the record is, however, that respondents, in the face of almost universal lower levels in the United States, are attempting to maintain their personnel and the salaries thereof at the levels obtaining in the more prosperous year, 1929. This necessarily has a depressing effect upon the net moneys available to the owners of these businesses which may be designated 'net owner incomes' " (R. 83).

It is alleged in the petition that total costs for compensation to workers were less in 1931 than in 1929 by $403,208.38, or approximately 22%; and that total selling and buying salaries were less by $231,703.51, or approximately 30% (R. 6). Despite this, as found by the Secretary (FF. 139, R. 95), the petitioner firms were required to employ more salesmen for each species in 1931 than in 1929. This necessity is attributable to changes in the character and mode of receipts, R. 706-708, 709, 721, 727-728, 734, 744-745, 758, 763, 794, 1061; and to changes in the methods of buyers and the nature of purchase units, R. 744, 776, 789-790, 840-842, 922, 1084.

lants cut salaries and reduced personnel to the fullest extent that was practicable under the circumstances.[3] Moreover, the rate which the Secretary has found to be unreasonable is not a pre-depression rate at all, but a rate established by these appellants in May, 1932, which lowered charges in line with the abnormally low prices of livestock then obtaining at the height of the depression.[4]

Finding 113 is a mere impressionistic make-weight. There is no ground for the conclusion that the Secretary intended to base his order upon this passing and erroneous statement, though if the order is to be deemed to be based upon finding 113, then it is clearly void for want of any evidence whatever to sustain it.

8. The ruinous and confiscatory effect of the rates as to each and all appellants requires that the order be enjoined without reference to the propriety of the allowances for particular components of the rate.

Turning from the bases of the order back to its effect, that effect requires that the order be enjoined, wholly irrespective of the theoretic validity of the economic principles upon which the Secretary may have determined any particular item in the balance sheet from which he prepared these rates. It is very clear that the statute gives him no authority to make a rate that will drive each and every market agency out of business and will permit only those who can do business on his theoretical rates to engage in the business. Examination of the particular items in the rate is, therefore, wholly unnecessary. Even if this Court

---

[3]R. 711, 719, 723, 728, 729, 730, 737, 749, 758, 772, 773, 918, 922, 929, 963, 965, 1079.

[4]R. 2-3; FF. 6, 7, 8, 175, 179, R. 29-30, 126, 127.

should attempt to perform the duty which the court below has not performed and analyze each and every one of the items composing this rate and the Secretary's findings and the evidence in respect of them, there would be no hope of sustaining the order by balancing an error in respect of one item against an overallowance in respect of another (*cf. Los Angeles Gas Co.* v. *R. R.*, 289 U. S. 287). Here the effect of the rate order as a whole is confiscatory and is not only confiscatory but ruinous. If the Secretary were able to establish, which he is not, that every particular item in his calculation has a justifiable and reasonable basis, he would still have to explain the result. It would then be apposite for the Court to apply to the Secretary the rule which it has upon several recent occasions applied to the converse situation and rule that he had proved too much, and that his proof could not be squared with the actual results.

The recent decisions in which this Court has applied the doctrine of actual results to confound elaborate proof are too familiar to justify extended discussion. See *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 163-164; *Dayton Power & Light Co.* v. *Public Utilities Comm.*, 292 U. S. 290, 312. In those cases, however, the rule has been applied to judge the issue of confiscation by the actual effect of the rates on the business of the company and elaborate calculations have not been allowed to overturn it. As this Court said in the *Lindheimer* case:

> "This actual experience of the Company is more convincing than tabulations of estimates. In the face of that experience, we are unable to conclude that the Company has been operating under confiscatory intrastate rates. Yet, as we have said,

> the conclusion that the existing rates have been confiscatory—and grossly confiscatory—would be inescapable if the findings below were accepted. In that event, the Company would not only be entitled to resist reduction through the rates in suit, but to demand, as a constitutional right, a large increase over the rates which have enabled it to operate with outstanding success. Elaborate calculations which are at war with realities are of no avail. The glaring incongruity between the effect of the findings below, as to the amounts of return that must be available in order to avoid confiscation, and the actual results of the Company's business, makes it impossible to accept those findings as a basis of decision."

The rule there applied to defeat elaborate calculations claimed to show confiscation when the actual result of the rate was shown not to be confiscatory must, under any system of equal justice, likewise be applied when government seeks to hide a confiscatory result behind the barrage of elaborate calculation.

9. The inescapably confiscatory effect of the order requires reversal of the decree below with directions to enjoin the order, whatever the theory upon which based and whatever the scope of judicial review thereof.

The statute expressly accords the appellants a judicial review of the order of the Secretary (Sec. 204), a review to which the appellants are entitled as a matter of constitutional right on the issue of confiscation (*Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, 335).

No question can validly be made of the rights of appellants to be protected against confiscation, just as any other public service business whose charges are subject to public

control. The status of these appellants to raise the issue of confiscation and to have a determination upon it is not defeated by the personal service character of their business or by the fact that their pecuniary capital investment is small. This is clear upon principle,[1] was assumed by this Court in the *Tagg* case,[2] and has been assumed by the court below.[3] While pecuniary capital investments of the appellants are small, the record establishes that the majority of them have devoted the major portion of their lives to learning this business, many of them having engaged in it for a quarter to a half century at this very market.[4] To destroy their business, not as the normal result of competition and growth but by governmental command, is certainly to confiscate that which is as vital to the appellants as the physical plant or capital assets of a utility having a fixed physical equipment. As the English court said many years ago:

> "Every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it any more than of his life." *Case of Monopolies*, Trin. 44, Eliz., 11 Co. Rep. 84b, (77, Eng. Reprint, 1260).

On the issue of confiscation the order is clearly void *in toto*, from whatever angle approached and whatever view be accepted as to the scope of judicial review:

(a) In Point II *post* it is established, conclusively as we think, that this order as a whole is not based upon any attempt to make a reasonable rate but upon the assumption

---

[1] *Truax* v. *Raich*, 239 U. S. 33, 38-39; *International News Service* v. *Associated Press*, 248 U. S. 215, 236-237.

[2] 280 U. S. 420.

[3] R. 151-152.

[4] Res. Ex. 204.

of a power to make an unreasonably low rate which is attempted to be justified on the further assumption of a power to determine who shall enter into this business and how it shall be conducted. But the more or less extended analysis of the order undertaken in the succeeding point is really not essential to the establishment of this conclusion. It follows as a necessary and inescapable conclusion from what has already been said in this present point, that a rate fixed at a level which is confiscatory as to everybody is not a result which is contemplated by the statute and hence the order must be based upon an erroneous view of the Secretary's powers. When this Court finds that an order of an administrative body is based upon an assumption of power not granted to it, its practice is not merely to reverse the court below but to remand with directions to the lower court to enjoin the order and grant the relief prayed in the bill (*Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452).

(b) The same decree would be required if the case be regarded from the standpoint of the confiscatory effect and result of the challenged rates, without reference to the theory of law upon which they purport to be based. Confiscation is determinable as a matter of fact (*Lindheimer* v. *Illinois-Bell Telephone Co.*, 292 U. S. 151, 169), and "In determining what is a confiscatory regulation of rates, it is necessary to consider the actual effect of the rates imposed in the light of the utility's situation, its requirements and opportunities" (*Smith* v. *Illinois-Bell Telephone Co.*, 282 U. S. 133, 160). That inquiry as respects the appellants to this cause has been made in the preceding pages, and it discloses beyond question that the rate order is confiscatory as to each and every appellant. There is no find-

ing either by the Secretary or by the court below that the rate is or will be compensatory as to anyone, and, if there were any such finding, it would not only be opposed to the weight of the evidence, not only be lacking in a scintilla of evidence to support it, but would be lacking support of any evidence whatever.

In the light of the uncontroverted showing as to the result of these rates, the order is wholly void and the decree below erroneous whatever view is taken as to the scope of the judicial review to which, as we have seen, the appellants are constitutionally entitled upon the issue of confiscation. The majority of the court below, as previously pointed out, finally came to the conclusion that, although the order was against the weight of the evidence, they could not disturb it unless it was made without *"any* evidence to support" it. This, of course, is an erroneous rule, because it is well settled that, even in respect of ordinary matters as to which administrative orders are final if supported by substantial evidence, the rule does not permit an order to stand which is supported by a mere scintilla of evidence. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547-548. However, there is not even a scintilla of evidence to show that these rates are compensatory, whereas every bit of evidence on the subject in the record establishes that they are confiscatory.

(c) But appellants are entitled to have the court itself weigh the evidence on the issue of confiscation and not merely to determine whether there was any substantial evidence supporting the order. This has been expressly ruled by this Court (*Ohio Valley Water Co.* v. *Ben Avon*

Borough, 253 U. S. 287, 289) and has been the consistent practice.

Knoxville v. *Knoxville Water Co.,* 212 U. S. 1, 8;

Prendergast v. *New York Telephone Company,* 262 U. S. 43, 50;

Bluefield Water Works & Improv. Co. v. *Public Service,* 262 U. S. 679, 683;

Northern P. R. Co. v. *Department of Public Works,* 268 U. S. 39;

Lehigh Valley R. Co. v. *Board of Public Utility Commissioners,* 278 U. S. 24, 36;

United R. & Electric Co. v. *West,* 280 U. S. 234, 251;

Chicago, R. I. & P. R. Co. v. *U. S.,* 284 U. S. 80; and

West v. *Chesapeake & P. Telephone Co.,* 295 U. S. 662.[4]

---

[4]The question posed but not decided in *Tagg Bros. & Co.* v. *Moorhead,* 280 U. S. 420, 445, as to whether in cases under the Packers & Stockyards Act the rule adverted to requires a trial *de novo* with the admission of additional evidence when the issue of confiscation is raised, does not throw any doubt upon the settled rule of the cases cited above that, on the issue of confiscation, the court, whether the case is heard upon the administrative record or also upon new evidence introduced before it, has the duty itself of weighing the evidence and of reaching its own conclusions of fact.

The rule requiring that the court shall give an independent judgment upon the facts as well as law has not been limited to issues of confiscation but has been expressly extended to issues of fundamental or jurisdictional fact underlying the validity of the legislative or administrative action (*Crowell* v. *Benson,* 285 U. S. 22, 58), and extended to all claims of constitutional right, for the dual purpose of affording adequate protection to such right through the "difference in security of judicial over administrative action" (*Ng Fung Ho* v. *White,* 259 U. S. 276, 284-285) and of maintaining the appropriate function of the judiciary in the enforcement of basic rights (*Crowell* v. *Benson,* 285 U. S. 22, 46, 60-61). See *Phillips* v. *Commissioner,* 283 U. S. 589, 600; *Tagg Bros. & Moorhead* v. *U. S.,* 280 U. S. 420, 443-444.

It would appear to be unnecessary to weigh the evidence to establish the confiscatory effect of the rate order when all the evidence on that point is one way and establishes the confiscatory nature of the order beyond dispute. If, however, the order be looked at not from the standpoint of its results but from the standpoint of the adequacy of particular components of the rate, it appears that a majority of the court below has already weighed the evidence and found that the Secretary's findings in respect of the most important components of the rate (those relating to salesmanship and business getting expenses) are against the weight of the evidence (R. 166).

If effect is to be given, therefore, either to (a) the obvious improper assumption of power upon which the whole order is based, or (b) to the established and practically confessed confiscation from the standpoint of effect and result of the rates upon all of the appellants collectively and separately, or (c) to the absence of evidence to support the particular findings of the Secretary as to individual components of the rate, we submit that the order is clearly seen to be void and must be enjoined.

In the light of the uncontradicted showing as to confiscation, the only basis upon which the decree below may be explained appears to lie in the court's conclusion that the statute conferred upon the Secretary "almost dictatorial power in the establishment of such rates" (R. 157); and that it at the same time reduced the status of the courts from tribunals empowered to enter judgment according to the law to the impotent position of merely suggesting, as the court below did on two occasions, that additional prayers for relief be addressed to the Secretary who might perchance heed them (R. 157, 166). It is submitted that neither this view of the statute nor this view of the authority of the courts can be given any countenance.

POINT II.

THE ORDER IS ARBITRARY AND BASED UPON A MISCONCEPTION OF THE POWERS AND DUTIES OF THE SECRETARY, UPON A DEPARTURE FROM SETTLED AND RECOGNIZED STANDARDS, BOTH OF REASONABLENESS AND OF ADMINISTRATIVE AUTHORITY, AND UPON AN INTERPRETATION OF THE POWERS OF THE SECRETARY WHICH, IF CORRECT, WOULD GIVE RISE TO A SERIOUS CONSTITUTIONAL QUESTION AS TO ITS VALIDITY, WHICH SHOULD BE AVOIDED.

The constitutionality of the rate making provisions of the Act is no longer, if it ever was, open to dispute. *Tagg Bros. & Moorehead* v. *United States,* 280 U. S. 420. The order is nevertheless void if based upon a misconception of the powers and duties of the Secretary or upon a departure from recognized standards contemplated by the Act to be pursued, or if without legal support in the evidence.

That the findings and order are without legal support in the evidence will, we think, plainly appear from subsequent subdivisions of this brief, but without a meticulous examination of the findings and order in the light of the evidence itself, we think it plain that it is based upon a misconception of the powers and duties conferred upon the Secretary and rests upon the application of standards other than those contemplated by the Act, and at variance with settled and recognized standards, both of reasonableness and of the limits of administrative authority. Moreover, if the Act is to be interpreted as conferring upon the Secretary such unlimited authority as that which has been

exercised and on authority to be exercised for the purposes for which, as appears upon the face of the order, it was exercised, it has, we think, been interpreted in a manner which either renders it unconstitutional or which gives rise to a serious constitutional question, which should be avoided in its interpretation, if possible.

The order is predicated upon the determination by the Secretary of the so-called reasonable cost of conducting the business. The aggregate so-called reasonable costs, as so determined, are $1,210,604.43.[2]

The actual costs as determined by the Government's own accountant were $1,674,460.56, and as determined by the respondents' accountant in the proceedings before the Secretary, $1,813,709.15.[3]

The order, therefore, is predicated primarily upon the assumption that the business can be conducted for ap-

---

[2]Pet. Ex. 7, R. Vol. III, p. 9. Curiously enough, the Secretary makes no finding as to these costs in the aggregate or as to any agency and, having made none, makes no finding as to the relation between so-called reasonable cost and the revenues which would accrue under his rates either in the aggregate or for any agency. Indeed, the Secretary made no application of his rates to the business conducted, although the record before him contained full information as to its volume in respect of each agency, and as to the costs incurred by each, as well as in the aggregate. This alone seems to us to constitute serious omission in the way of essential findings (*Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74; *Florida* v. *United States*, 282 U. S. 194), unless the Secretary is authorized to pick any rates he chooses out of the air, irrespective of their result. The failure to make such application or findings also emphasizes the purely arbitrary character of the order when considered in the light of the actual results disclosed by the discussion under the preceding point.

[3]Pet. Ex. 7, R. Vol. III, p. 9. These gross figures are derived in respect of the Secretary's so-called reasonable costs by applying the so-called unit expenses as found by him to the number of head handled, and in respect of actual costs, upon the basis of the cost studies presented in the proceedings before the Secretary. They are not open to challenge, were not contradicted in the hearing of the case in the court below, and are, we believe, incontestably correct.

proximately three-fourths of the expenses actually incurred, as determined by the Government's own accountant, and for approximately two-thirds of the expenses actually incurred, as determined by the respondents' accountant. It is this drastic reduction of so-called reasonable cost below actual cost that accounts for the inadequacy of the returns not only to the agencies as a whole but to every agency engaged in the business, as disclosed by the results of the order analyzed under the preceding point. These results, in turn, are due to the fact that the Secretary disregarded actual experience and substituted purely hypothetical standards as distinguished from his order in the *Tagg* case which, as found by the District court in that case (29 F (2d) 750), was predicated upon actual cost.[4] In any event, the rates fixed, as already conclusively established, are wholly insufficient to afford adequate compensation to any of the agencies or their owners, and below the actual cost of performing the service by many, including the largest and most efficient, which, if any, should be expected to show net returns under any rates within the zone of reasonableness. It is upon these facts we rely in our contention that the order is confiscatory, or if not, clearly the result of a purely arbitrary exercise of power; but be these contentions well taken or not, the facts disclosed have an important bearing upon the sufficiency of the rates under

[4]This is particularly true in respect of the all important item of salesmanship and salesmen's cost, which, upon the face of the order, is based upon a purely hypothetical standard as to the number of each species which a salesman should sell, which the uncontradicted evidence before him disclosed had never been attained by any salesman or any agency, even including those having the largest volume of business and which, unless they are employing unnecessary help at expense to themselves, should have had sufficient volume to attain the hypothetical standard set up, if such attainment were possible (Point IV, *post*).

standards of reasonableness and upon the limits of administrative action, well recognized at the time of the passage of the Act.

1. In making the order the Secretary departed from all recognized and established standards of reasonableness in effect at the time of the passage of the Act.

The grant of power is practically in *haec verba* with that contained in the Interstate Commerce Act, viz., to prescribe "what will be the just and reasonable rate or charge or charges to be thereafter observed" (Packers & Stockyards Act, Sec. 310).[1] The House Committee in reporting the bill, as pointed out in the opinion of this Court in the *Tagg* case (280 U. S. 420, 435n) said, referring to this section:

> "* * * the Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads, including the power, after full hearing, to establish and enforce just and reasonable rates and charges for, and practices in connection with, the furnishing of stockyard services."[2]

The two Acts, although applying to different businesses, are in *pari materia,* and the Congress obviously intended to confer upon the Secretary the same powers conferred upon the Interstate Commerce Commission by the Interstate

---

[1]Compare Sections 1 and 15 of the Interstate Commerce Act.

[2]As likewise pointed out in the opinion in that case (footnote p. 435):

> "By the definitions contained in §301 (b) and (c), the term 'stockyard services' includes the services rendered by the plaintiffs."

Commerce Act, no more and no less. While the same words may be used in two different acts with different meanings, the obvious purpose of this Act, as demonstrated by the foregoing excerpt from the House Report, as well as by its language, was to confer upon the Secretary the same powers conferred upon the Interstate Commerce Commission, and subject to the same limitations. In so doing the Congress must also be assumed to have been familiar with the standards of reasonableness and of administrative authority under the interpretation theretofore placed upon the Interstate Commerce Act, including its administrative interpretation (*U. S.* v. *Jackson,* 280 U. S. 183, 196, 197; *U. S.* v. *Midwest Oil Co.,* 236 U. S. 459, 481, *United States* v. *Baruch,* 223 U. S. 191, *Northern Pacific R.R. Co.* v. *Musser-Sauntry Land, Logging & Mfg. Co.,* 168 U. S. 604, 608), and to have enacted the statute in the light of such prior interpretation of the Act after which it was patterned (compare *The "Abbotsford",* 98 U. S. 440, 444, *Kepner* v. *United States,* 195 U. S. 100, *United States* v. *G. Falk & Brother,* 204 U. S. 143, 152, *United States* v. *Cerecedo Hermanos y Companie,* 209 U. S. 337, 339, *Brewster* v. *Gage,* 280 U. S. 327, 337, *Manhattan Properties Company* v. *Irving Trust Company,* 291 U. S. 320).

The proceeding before the Secretary involved all of the rates of all of the agencies on all species handled at the yards. The problem with which the Secretary was confronted was, therefore, substantially the same as that which has confronted the Interstate Commerce Commission, from its inception, in the determination of reasonable rates and the prescription of a standard for such determination in a general rate case involving all the carriers in a given group or district, as distinguished from one involving the deter-

mination of particular rates for a particular carrier or carriers. Prior to the enactment of the Transportation Act, the only standard of reasonableness imposed by the Interstate Commerce Act was the simple declaration that the rates should be just and reasonable. Upon numerous occasions, prior to the adoption of the Transportation Act, the Commission had occasion to interpret its powers under the Interstate Commerce Act for the purpose of determining the standard of reasonableness and the limits of its administrative authority in such a general rate case. One of the first cases in which it established a standard of reasonableness for such cases was *Re proposed Advance in Freight Rates,* 9 I. C. C. 382, 425, 426, involving the question of a uniform rate for grain from Chicago to New York, rates which, as the Commission remarked, would govern the charges of all railroads transporting grain between those points, regardless of the difference in their costs. The Commission pointed out that "It might be manifestly unfair to select a single advantageous line and make that the standard" (p. 425), and that "Upon the other hand, it would be equally unfair to the public if the most expensive line were made the standard" (p. 426). After giving examples of the least expensive and the most expensive lines, and disregarding them as no proper standard, the Commission took as its standard for fixing the rate the New York Central and the Pennsylvania, whom it found to be typical carriers in respect of the commodity and territory involved (p. 426).[3]

The principle of this decision was again applied in *Eastern Rate Case,* 20 I. C. C. 243, 274, and in the *Western*

[3]It remarked that the situation would not be changed if it included the Baltimore and Ohio as a typical road also in respect of this traffic.

Rate Case, considered at the same time, 20 I. C. C. 307, 325. Each of these cases involved a proposed uniform advance in substantially all rates in the Eastern and Western Districts respectively.

In the *Eastern Rate Case, supra,* after adverting to prior rulings and similar situations, the Commission said:

> "What is the reasonably fair application of this *rule* to the case before us? The Pennsylvania lines extend from New York, Philadelphia, and Baltimore to Chicago and St. Louis and reach most of the important cities west of Buffalo and Pittsburgh by their own rails. In the year 1909 the earnings of that system were more than one-quarter of the aggregate earnings of all the 41 railroads previously named, which embrace practically all lines in the Official Classification. If reference be had to those lines mainly interested in this traffic the percentage of income would be still larger. This Commission might very well say that it would make the Pennsylvania system the *standard* by which to measure the reasonableness of their rates. On the whole, however, it seems fairer to include with the Pennsylvania the New York Central lines upon the north and the Baltimore & Ohio upon the south. The freight revenues of these three systems would be nearly one-half of the total revenues of all railroads in the territory in question, and they transport this traffic by their own rails between all important places. In 9 I. C. C. Rep., 382, this Commission considered the justice of certain advances in grain rates between Chicago and the Atlantic seaboard and it there held that whatever rate might reasonably be imposed upon these three systems must be held to be a reasonable charge for that service by all lines. We hold to the same view in this investigation. We do not mean that other lines should not be considered,

> but that these systems may be taken as *typical.* Under rates reasonable for these three systems there may be lines whose earnings will be extravagant, but that is their good fortune. There may be lines which can not make sufficient earnings, but that is their misfortune. We ought not to impose upon this territory, for the purpose of allowing these defendants additional revenues, higher rates than are adequate to these three systems considered as a whole." [Emphasis ours.]

The Commission thus adopted as a standard of reasonableness in that case the composite results of operation on the Pennsylvania, New York Central and Baltimore and Ohio as typical lines in the territory.

It pursued the same course in the *Western Rate Case, supra,* in which the Santa Fe and Burlington were selected for the purpose stated, and the reasonableness of the rates measured by their composite performance. The principles of these cases were again restated and applied in *1915 Western Rate Advance Case,* 35 I. C. C. 497, 560-561; see also *City of Spokane* v. *N. P. Ry. Co.,* 15 I. C. C. 376, 393-394, *Kindel* v. *N. Y., N. H. & H. RR. Co.,* 15 I. C. C. 555, 561, *Newport Mining Co.* v. *C. & N. W. Ry. Co.,* 33 I. C. C. 645, 656.

It was thus recognized administrative law, under a statute granting power of the same kind and in the same words, that the reasonableness of the rates charged or to be charged by a number of competing public agencies was not to be measured by the relation between revenue and cost, or the results of operation of all combined, or of the most favorably situated,[4] or of the least favorably

[4]Even under so drastic a standard as this the instant order is void, for under it *no* agency will receive adequate compensation.

situated, but by the composite results of a group of those agencies which might reasonably be taken to be typical and representative of the business. Such was the recognized standard of reasonableness and of the limits of administrative authority under the Interstate Commerce Act, when the Packers & Stockyards Act was passed.

The same principle was apparently applied in the *Tagg Brothers* case, as evidenced by the opinion of the District Court, from which it appears that the so-called reasonable cost determined by the Secretary, upon the basis of which the rates were fixed, coincided with the actually experienced costs of typical and representative firms.[1]

In this case the Secretary has disregarded all experience. He has established rates inadequate to pay the cost either of any group of agencies, including the largest and most efficient, which might be regarded as typical or representative, or of any agency, and in addition, a reasonable compensation to the owners, most of whom would receive little or nothing, and none of whom would receive compensation which, by the wildest stretch of the imagination, could be regarded as extravagant. Had the Secretary given heed to composite cost and the relation thereof to the revenues of any group of agencies under his rates, or of any single typical or representative agency, he could not have entered the order which he made. He therefore departed from the standards of reasonableness and of administrative authority, long recognized and applied at the time of the passage of the Act by the only administrative tribunal then exercising the same powers thereby conferred upon the Secretary. On the contrary, he proceeded upon the assumption that it was within his power to estab-

[1] 29 Fed. (2d) 750, 755.

lish rates so low as to make it impossible for any existing agency to conduct its business either without loss or at adequate compensation for the services of the owners, in the expectation that he would thereby set in motion a survival-of-the-fittest contest, which would ultimately reduce the number of agencies engaged in the business, and in the hope that those fortunate enough to survive might be able, at some indefinite future date, to live under the rates prescribed through the attainment at some time in the future of the purely hypothetical standards of performance upon which his so-called cost determination was based, after their less hardy competitiors had perished. That the order can be sustained only upon the assumption that the Secretary is possessed of power thus to limit the ultimate number engaged in the business by fixing rates so low as to be presently non-remunerative for all, we think plainly appears, as will be hereinafter shown. But whether such was his purpose or not, the rates as fixed are incontrovertibly non-remunerative as to every agency and will result in actual loss to many. This is so because the Secretary, unlike the Interstate Commerce Commission in the cases cited, disregarded all actual experience and prescribed rates wholly at variance therewith. In thus departing from long recognized standards of reasonableness and of the limits of administrative authority, the Secretary departed from the standards of reasonableness contemplated by the Act at the time of its passage. Upon this ground alone the order should be set aside.

Moreover, in this Act, as in the Interstate Commerce Act, the requirement that rates shall be just and reasonable means that they shall be just and reasonable to the public agency involved as well as to those who employ its services.

It was no doubt on this account that the Commission construed the Interstate Commerce Act as requiring it to consider the actual experience of typical and representative carriers rather than that of the most favorably situated, and, on the other hand, to disregard both those most unfavorably situated, or the composite results of all as resulting in injustice to the public. Here the Secretary has wholly disregarded the requirement that the rates be just and reasonable to the agencies as well as to the public and has prescribed rates under which none can live.

2. The order is based upon an erroneous conception of the Secretary's powers and duties and upon an interpretation of the Act which it would seem would render the Act unconstitutional or at least give rise to a serious question as to its constitutionality.

The key to the order is to be found in these words:

> "129. There are more firms and a larger personnel on the Kansas City market than are necessary to dispose of shippers' livestock effectively. A smaller number of firms than are now engaged could handle the business more economically * * *" (FF. 129, R. 90).

That such is the basis of the order is demonstrated by other statements contained therein, such as

> "Moreover, the unit costs of many of the firms are high because the volume of business coming to the market is divided among too many firms and handled by an unnecessarily large personnel * * * " (FF. 130, R. 90).

And:

> "In arriving at a reasonable cost to be covered into rates in the case of those functions, the expenses of which are automatically held down, the costs as actually incurred by each of the firms should be considered and the reasonable cost arrived at, giving due consideration to the circumstances under which each of the respondents operates. In case of those costs which the conditions of the business tend to increase, such as the cost of salesmanship and the cost of advertising, expenses as actually incurred by *any* firm or by all of the firms do not furnish an adequate guide to the reasonableness of such cost * * *" (Emphasis ours) (FF. 131, R. 91).

Consequently, in determining the so-called reasonable cost of the all important items of salesmanship, the Secretary adopts a hypothetical standard unattained by any salesman or any agency; no matter how large the volume of its business, and in the equally important item of business-getting and maintaining expense (loosely referred to in the foregoing quotation as advertising but really, as appears from the statement, expense incurred largely, if not primarily, for the purpose of maintaining such contacts with shippers through correspondence or personal visit as will enable the salesmen to produce the best possible price for the growers' cattle) his order is based on an arbitrary allowance of 10% of all other so-called reasonable cost, unsupported by the actual cost experience of any agency.[1]

---

[1]The adoption of the hypothetical standard of salesmanship and the determination of cost of salesmanship on the basis of such standard is in effect equivalent to a finding that, whereas there were 188

The declaration that there are too many agencies and too large a personnel is immediately followed by the disclaimer of authority to limit the number of such agencies or employees, the Secretary saying:

> "The Packers and Stockyards Act does not clothe the Secretary of Agriculture with authority to determine how many firms would be required to handle the business properly or what specific firms should be engaged in business or whether some firms are unwisely continuing in business * * *" (FF. 129, R. 90).

Nor does the Act confer upon him any such power. The rates prescribed were clearly made as low as they were for the purpose of limiting the number which might successfully engage in the business. If the Secretary, pursuing the standard followed by the Interstate Commerce Commission, had based the rates upon the actual cost and performance of typical representative agencies, receiving "enough livestock to enable it to handle its business in a reasonably efficient and economic manner" at rates "high enough to produce sufficient gross revenues to pay reasonable costs and

---

full time cattle salesmen, 50 hog salesmen and 15 sheep salesmen in 1931 (Pet. Ex. 9, R. Vol. III, p. 11), 79 cattle salesmen, 12 hog salesmen and 8 sheep salesmen were all that were necessary. (These figures are obtained by dividing the total number of each species by the hypothetical performance per salesman.) This despite the existence of many firms having a sufficiently large volume of cattle to have reached the hypothetical standard, if actually attainable. The attempt to explain this reduction away on the theory (R. 91) that "while, for example, one salesman may be able to sell 30,000 head of cattle received by one firm, if the same volume be divided between two firms, two salesmen will be required," will not wash. This is so, because there is no agency at the yards handling 30,000 head of cattle or more, which sells them through the employment of a single salesman. On the contrary, despite volume, even the largest firms handling the largest volume of business, which, under the hypothetical standards, should have been disposed of through not more than four salesmen, have actually employed not less than six (See Point IV, *post*).

a reasonable compensation" and "under ordinary conditions as they prevail on the Kansas City market" (FF. 114, R. 83), which the Secretary in the Finding from which this quotation is taken declared to be the guide adopted, no one could complain, so long as the agencies so chosen as representative could be fairly said to be so within the exercise of the Secretary's administrative discretion. This, however, is not what the Secretary has done. On the contrary, he has fixed the rate so low that no agency will receive adequate compensation therefrom and that many, including those having the largest volume and therefore fully meeting the test laid down by the Secretary, will fail to pay the actual out-of-pocket cost of conducting their business.

The necessary result and, without question, the intended effect of the order, is to make the rates so low that no agency, however great its volume, can live thereunder. By so doing, the Secretary obviously intended to set in motion a survival of the fittest contest among the agencies now engaged in the business by compelling all to operate at ruinously low rates in the hope and expectation that many will be driven out of business, and after this has taken place, that the survivors, if any, *may* be able to pay expenses and make some return at the rates prescribed on the increased volume of business which it is assumed they will then have.[2]

---

[2]The Secretary does not say to what number the agencies, which may properly engage in the business, should be reduced through this process of elimination. There is no finding, either as to the number in contemplation, the volume of business which each would be required to do, or the probable effect upon their net revenues if done. The absence of such findings doubtless is due to the consciousness on the part of the Secretary that if made, they would be wholly speculative and conjectural. But so are both the hypotheses upon which the rates are fixed and the probable results to any agency. The only thing that is certain and indisputable on the record is that there is no agency today in business, no matter how large its volume or how efficiently operated, that can make money at the rates prescribed.

It is as though the Interstate Commerce Commission, believing as many do that there are too many railroads or at least too much duplicate or unnecessary mileage in the United States to admit of ideal operation in the most effective and economic manner, should reduce all the rates on all the railroads so that none could pay expenses in the hope that, through the elimination of marginal roads and unnecessary mileage, or through consolidations of roads, terminals or services, or the pooling of traffic, or by all of these means combined, the number, mileage and services remaining would be sufficiently reduced to permit the survivors to pay expenses and earn a fair return upon their investment. If under the power to establish just and reasonable rates, such power may be exercised by an administrative officer or tribunal, provisions for consolidation of railroads or of terminals, or for the enforced coordination of activities, etc., concerning which the Congress has hitherto proceeded upon the assumption that legislation was required, are quite unnecessary.[1] The Commission could do

---

[1]Compare *Interstate Commerce Commission* v. *United States ex rel. City of Los Angeles*, 280 U. S. 52, 68-69, where it was claimed that the Commission under its statutory authority to provide for "reasonable, proper and equal facilities" had power to compel the interstate carriers to build a joint union passenger station at Los Angeles. The trial court, quite like the concurring judge in the court below in this case, sustained the asserted power upon the view that the statute vested the Commission "with almost unlimited power in the matter of establishing terminals and union stations". In reversing that decision, this Court said:

> "Without more specific and express legislative direction than is found in the act, we cannot reasonably ascribe to Congress a purpose to compel the interstate carriers here to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles. The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, that power we should expect to find in congressional legislation."

the job by the simple device of forcing the complete reconstruction of the industry along such economic lines as the Commission deemed most advantageous by reducing the rates to such a level that none could exist. Congress conferred no such power upon the Commission. Nor has it conferred any such power upon the Secretary. The fact that railroads represent a fixed investment is immaterial. This Court has expressly ruled that the right to earn a livelihood through personal services, that is, the right to acquire property, is as much entitled to protection from arbitrary power as are rights in physical property already acquired. *Truax* v. *Raich*, 239 U. S. 33, 38-39; *International News Service* v. *Associated Press*, 248 U. S. 215, 236. Only upon the suggesti[illegible]ained in the concurring opinion of Judge Van Valkenburgh in the court below that the Secretary is possessed of "almost dictatorial power" can the power sought to be exercised here be sustained.

The question is not one of mere interference with the conduct of the business as a function of management. The order proceeds definitely upon the conception that the Secretary may limit and regulate the number engaged in the business by making the rates for all so unremunerative as to drive out some indeterminate number, leaving the rest to survive if they can.

The issue is broader than that involved in the scope of these proceedings. As pointed out by the Court in its recent decision in *Jones* v. *Securities & Exchange Commission*,[2] "administrative bureaus and commissions" are being "necessarily * * * called into existence by the increasing complexities of our modern business and political

[2]Decided April 6, 1936, p. 12.

affairs." The permissible limits of administrative control of a business have never been defined, but within such limits control may be expected to increase. (*Cf. Nebbia* v. *New York,* 291 U. S. 502.) If, under the guise of regulating rates or prices, an administrative officer or tribunal may be permitted to remake the economic structure of an industry subject to regulation by reducing the rates for all engaged therein to such a level that none can live under them, in the hope that out of the general disaster that follows enough may hold on so that at some future date those, if any, who, at the expense of heavy cost to themselves have clung to the business in which previously engaged, may be able to meet such administrative officers' presently hypothetical standards, then the right of countless numbers of our citizens to make a living is dependent solely upon administrative fiat. The courts have never recognized such a thing as group confiscation. In the last analysis, however, the asserted exercise of such power involves just that, for in the intervening period of general and inevitable disaster to all, those, who ultimately survive, survive only as the result of irretrievable losses imposed upon them by public authority. Under such a conception of governmental power, the state of our economic society and the exercise of personal liberty is not substantially different from that prevailing in Russia, Germany and Italy.

The question, as in all such cases, is one of power, not of the wisdom or expediency of its exercise. The field of businesses subject to public regulation is growing. Considered from the standpoint of the public interest at large, there is no occupation that touches the public so directly as the conduct of retail stores. It is inconceivable that, even if the regulation of such business is permissible, either the

legislature itself or an administrative officer or tribunal, believing that there were too many stores in the aggregate, could reduce the prices for all to a level under which none could survive, for the purpose of reducing their number ultimately to some indeterminate number which might conceivably, at some time in the future, be able to conduct their business at moderate profit in conformity with purely hypothetical standards of efficiency and cost set up by the regulatory authority. Yet that is precisely what the Secretary has undertaken to do in this case. If administrative authority may proceed thus far, then, as stated in *Jones* v. *Securities Exchange & Commission:*

> "The mere will of an official or an official body is permitted to take the place of allowable official discretion"

and "the government ceases to be one of laws and becomes an autocracy".

We do not assert that rates must be made so as either to meet the actual costs of each and every agency or the average costs of all. We do assert that they may not be made, and certainly not under the facts of this case, so as to fail to pay the actual expenses of the most efficient, or leave but a bare margin thereover, and again, we repeat, the Secretary did not find that any of these firms were inefficiently operated, unless their failure to attain his hypothetical standards and to conduct their business upon the basis of his hypothetical costs constitutes inefficiency.

If Congress should directly confer upon any administrative tribunal the power to reduce all rates to a level so low that none could live thereunder, for the purpose of thereby limiting those who would thereafter engage therein, we think it is plain that such an act would be con-

trary to fundamental law. If not, it would in any event give rise to a serious question as to its constitutionality. The Secretary has in effect so interpreted this act. Such interpretation not only finds no support in judicial literature or administrative practice and standards, but should be rejected in order to avoid the serious constitutional question arising on such interpetation.[2]

Assuming power in the Congress to empower an administrative officer or tribunal to limit the number of persons who may engage in a business, subject to public regulation, below the number already engaged therein by requiring certificates of public convenience and necessity, or through other appropriate means, this is not such a statute. Nor would an act, seeking to accomplish this result indirectly, by empowering such administrative agency to reduce the rates of *all* persons then engaged therein to an unremunerative basis for the purpose of reducing such number, through the process of attrition, be either a reasonable or legitimate means to the accomplishment of such limitation in number.[3] While such a direct limitation might deprive some persons then engaged in the business from

---

[2]*Panama R. Co.* v. *Johnson,* 264 U. S. 375, 390; *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466, 471, 472; *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 346; *Blodgett* v. *Holden,* 275 U. S. 142, 148; *Lucas* v. *Alexander,* 279 U. S. 573, 577; *Crowell* v. *Benson,* 285 U. S. 22, 62.

[3]Thus, assuming the power to exclude the inefficient, the promulgation of a rate confiscatory as to all, efficient or inefficient, would have no reasonable relation to the accomplishment of that power. This Court has ruled in analogous situations that price fixing statutes which spread a net for the feet of all, innocent as well as guilty, cannot be regarded as having reasonable relation either to the prevention of fraud and collusion (*Tyson* v. *Banton,* 273 U. S. 418, 442, 443) or the prevention of attempted destruction of competition and erection of monopoly (*Fairmont Creamery* v. *Minnesota,* 274 U. S. 1, 10).

further participation therein, it would require the administrative agency to establish rates for the remainder on a remunerative basis. An act or administrative order, whose purpose is to accomplish the same result by indirection through reducing the rates of all to an unremunerative basis, on the other hand, requires all to sustain losses during the indeterminate period necessary for the accomplishment of such purpose. For the reasons stated it seems to us that such a statute or such an order clearly violates fundamental law.

However this may be, Congress conferred no such power upon the Secretary. On the contrary, as disclosed by its legislative history and by the prior decisions of this Court, the purpose of the act was to permit and encourage engagement in the business of all comers without limitation, and it has been so construed by the Secretary. As appears from the decision of this Court in *Stafford* v. *Wallace*, 258 U. S. 495, the primary purpose of the Packers and Stockyards Act, so far as stockyards services were concerned, was to free the grower from the monopolistic control or manipulation of the markets, believed or found by Congress to rest in the packers, through control or intimidation of market agencies.[1] Its purpose was to create a free and open market in which competition should have full play. The Secretary has so construed the Act even to the extent of granting a permit to an agency which had been expelled from the Exchange for a shortage in his accounts.[2] The basic theory behind the order is that the competition intended to be promoted by the Act has reached excessive pro-

---

[1]Further statements as to the purpose of the Act are contained in *United Leather Workers* v. *Herkert*, 265 U. S. 457, 469, and *Atlantic Coast Line R. R.* v. *Standard Oil Co.*, 275 U. S. 257, 272.

[2]R. 229.

portions and that consequently the Secretary should correct this situation by the imposition of rates which will drive some of the existing agencies out of business. But, if the number to be permitted to engage therein is to be limited, contrary to the original Congressional purpose, it is for the Congress and not the Secretary to reverse its own policy by suitable legislation.

The Secretary has therefore given to the Act an interpretation, not only inconsistent with recognized standards of reasonableness, giving rise to serious doubts as to its constitutionality, as so interpreted, but contrary to the very purposes and objects of the Act as declared by Congress and as previously interpreted by this Court. That he has done so appears upon the face of the order itself from which it affirmatively appears that the purpose is not to establish rates predicated upon actual costs of any agency, even the most efficient, but to prescribe rates so low as to be unremunerative as to all and thus by a process of attrition limit the survivors, if any, to that indeterminate number which, in the Secretary's superior wisdom, should be permitted to engage in the business.

The order is void upon the quadruple grounds of confiscation, arbitrariness, departure from recognized standards, and the assumption of power not granted.

POINT III

THE FINDINGS AND ORDER CONTAIN NO LEGALLY SUFFICIENT FINDING THAT THE EXISTING RATES ARE UNREASONABLY HIGH.

The making of such a finding is jurisdictional to a reduction in the rates for the future.[1] An ultimate finding to this effect, expressed in the language of the statute, is not sufficient.[2] It must be supported by adequate evidentiary findings.[3]

The Secretary did not find that, under the existing rates, the compensation accruing to the owners of the agencies as a whole or to *any* of them was excessive. Such a finding, if made, would have been unsupported by and contrary to the evidence.

He did not find that the rates charged exceeded the value of the service to the grower. On the contrary the uncontradicted evidence showed that the selling rates were but an infinitesimal proportion of the value of the livestock sold, and materially less, in proportion to value, than the corre-

---

[1]See *Interstate Commerce Commission* v. *Louisville & Nashville R.*, 227 U. S. 88, 92; *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 105; *Interstate Commerce Commission* v. *Northern Pacific Railway*, 216 U. S. 538, 544; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 82. The provisions of present Act (§§ 306, 310) are modeled after the provisions of the Interstate Commerce Act involved in the above cases.

[2]*Florida* v. *U. S.*, 282 U. S. 194, 213; *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506.

[3]*Florida* v. *U. S.*, 282 U. S. 194, 208, 212, 213, 215; *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506. See *Illinois Central R. Co.* v. *State Public Utilities Comm.*, 247 U. S. 493, 507, 508; *Railroad Comm. of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579, 580; *New York* v. *United States*, 257 U. S. 591, 600; *cf. Schechter Corp.* v. *U. S.*, 295 U. S. 495, 539, 540.

sponding charges at other public markets for the sale of other agricultural products and less than similar charges for the sale of livestock in large droves on the farm or ranch.[1]

He set up, as the "guide" to be followed, the rule that "under ordinary conditions as they prevail on the Kansas City market" the rates should be high enough to afford "reasonable compensation" to the "owner or owners of any firm which receives enough livestock to enable it [to] handle its business in a reasonably efficient and economic manner".[2] But he did not find that as to any such firm the existing rates afforded excessive compensation; or that "under ordinary conditions as they prevail on the Kansas City market" the compensation accruing to the owners of any firm was excessive; or that there was *any* firm at the Kansas City market having a sufficient volume to meet his test. Any such finding or findings, if made, would have been unsupported by any evidence and contrary to the evidence. In fact he disregarded such "ordinary" and "prevailing" conditions and based all his conclusions on the assumption of conditions wholly non-existent.

He did not find the existence of any monopolistic practice or of any practices affecting the free flow of interstate commerce (*cf. Stafford* v. *Wallace,* 258 U. S. 495, and *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420). On the contrary the record shows that the market is free from all such practices.

He affirmatively found that salesmen are bargainers, not auctioneers; that the rates are on a unit or headage basis (from which it follows that the compensation accruing to the agency is the same, whatever the price) and that

[1]Statement, pp. 28-29, *ante.*
[2]FF. 114, R. 83.

the price received per head varies materially on the same day on the same grade of cattle; and, either directly or inferentially, that the services performed for the purpose of getting the best obtainable price (whether by way of careful bargaining, country contacts and appraisals or by other means, all of which were reflected in the actual cost incurred), as the business is conducted "under the ordinary conditions as they prevail on the Kansas City Market," are of direct benefit to the grower in the attainment of such price.[3] He did not find that under such "ordinary" and "prevailing" conditions they could be performed by any agency at less cost, or that, under the hypothetical conditions assumed by him, the grower, for whom these services are performed, would fare as well.

The finding that the existing rates are unreasonably high was thus unsupported by either evidentiary findings or evidence and was contrary to both.

---

[3]pp. 21-23, *ante;* FF. 65, 84, 51, 89, 93, 94, R. 55, 64-68, 49-50, 73-74, 75, 76.

POINT IV.

THE SECRETARY'S ALLOWANCE FOR SALESMEN'S SERVICES IS BASED WHOLLY ON SPECULATION AND HYPOTHESIS, IS ARBITRARY AND CAPRICIOUS, UNSUPPORTED BY EVIDENCE, AND BASED UPON AN ERRONEOUS CONCEPTION OF THE LAW AND OF THE SECRETARY'S POWERS.

The Secretary's allowances or findings of so-called reasonable cost.

The Secretary's so-called reasonable cost is a composite of so-called reasonable functional costs. Of these the most important is the cost of salesmanship and buying.[1] The Secretary's allowance for this item of cost is in respect of each of the three species based upon a purely hypothetical standard of salesmanship performance, to wit, that a cattle salesman should sell 29,000 head of cattle a year, a hog salesman 85,000 head, and a sheep salesman 250,000 head. The Secretary further finds that the reasonable value of the services of a cattle salesman is $4,000 per annum, of a hog salesman $3,000 per annum, and of a sheep salesman $3,500 per annum.[2] The Secretary has, therefore, divided the total number of each species

---

[1]The Secretary made no effort to determine separately the cost of selling and buying but lumped the two together, although it is obvious from the Record (p. 59, n. 2, *ante*) that the cost of buying is materially less than the cost of selling. Buying rates are not involved, and since most of the agencies are predominantly sellers and not buyers, they manifestly cannot recoup the loss in selling through the application of increased rates for buying, which the Secretary's orders allowed, whether or not the buying rates are, as appellants believe, higher than the traffic will bear, and consequently incapable of actual realization.

[2]FF. 143, R. 97.

sold by the hypothetical performance assumed, for the purpose of determining the number of salesmen required to conduct the business on such hypothesis, and then multiplied the assumed annual service value per salesman by the number of salesmen so determined. Having thus arrived at the total cost of salesmanship for each species,[3] this figure is in turn divided by the total number of each species handled, whether bought or sold (although the evidence shows that the cost of selling exceeds the cost of buying), and the quotient adopted as the reasonable cost of selling per head for each of the several species.

In the year 1931 there were 188 full year salesmen and buyers of cattle in the Kansas City market, 50 swine sales-

[3]The resulting difference in this hypothetical cost of salesmanship and its actual cost is much greater than that indicated by the tabulation attached to the petition as Exhibit C (R. 130A). Salesmen, as indicated in the statement, participate in the performance of other functions, such as yarding, office work, supervision (particularly by owners), and the making of trips to the country for the purpose of inspecting livestock, advising growers, acquainting themselves with the condition, feeding, etc. of livestock for the purpose of enabling the salesmen to obtain the best possible price for the shipper both through advice as to time of shipment and first-hand acquaintance with the livestock. The Government accountant allocated salesmen's salaries among these several functions, according to the time devoted to each, with the result that the cost of salesmanship as determined by the Government's accountants and set out in the table on the exhibit in question is materially less than the total cost of salesmen's salaries. Under the basis adopted by the Secretary, salesmen's salaries are allocated wholly to the cost of salesmanship, but reduced in amount below actual salary roll by the assumption that in the case of cattle, for example, 79 cattle salesmen and buyers should perform all of the services now performed by 188. If the Secretary's allowance of $4,000 as the reasonable value of the services of the salesman or buyer be multiplied by the actual number of such persons in service, instead of the number determined by the Secretary, the reasonable cost for cattle would be $752,000 instead of $316,000. This difference is almost sufficient to account for the entire discrepancy, $422,072, between so-called reasonable cost for all functions and species as determined by the Secretary and actual cost (Pet. Ex. 7, col. 9, R. Vol. III, p. 9).

men and 15 sheep salesmen. For the services performed by them the Secretary allowed but 79 cattle salesmen, 12 swine salesmen, and 8 sheep salesmen.[4] The number of cattle salesmen and all sheep salesmen would thus have to be cut in half, and the number of swine salesmen would have to be quartered, or, if more salesmen were employed, they would be required to act without pay, or if owners, without compensation for their services, or the agencies by whom employed would have to absorb the resulting loss. This result, flowing from the hypothetical standard assumed, is in itself sufficiently startling to challenge attention, and especially when it is borne in mind that under all of the uncontradicted evidence the standard of a salesman's efficiency, as measured by the appellant agencies, and as required in the interest of the growers (for whose benefit their services are performed) is not the number of cattle sold per year but the procurement of the highest possible price for the grower through the time-consuming process of bargaining.

In adopting his hypothetical standards and making them the basis of his salesmanship allowances, the Secretary has not merely ignored the actual salesmanship and buying performance of some of the less efficient agencies, if any are inefficient (of which there is no proof), but he has completely ignored the actual salesmanship and buying performance of even the most efficient firms, and has set up a hypothetical standard wholly unsupported by the practical experience of any, and greatly in excess of the actual performance of any of the agencies. Moreover, he has done this without making any finding of any kind that any agency is being either inefficiently or wastefully conducted.

[4]Pet. Ex. 9, R. Vol. III, p. 11.

1. The salesmanship allowance on cattle is based on a purely hypothetical standard, unsupported by and at variance with actual experience.

There is no evidence that any cattle salesman on the Kansas City Market has ever reached the Secretary's hypothetical standard. On the contrary, salesmen's performance as established by the Government's own exhibits discloses that in every agency, large and small, actual performance has fallen far below the Secretary's hypothetical standard. The Government's own exhibits further disclose that no agency handling a sufficient headage to admit of the application of the hypothetical standard would receive anything like adequate compensation under the rates prescribed and that many of them, including the largest and most efficient, would fail to pay expenses.

Of the agencies engaged in the sale of cattle in 1931, 26 sold approximately 29,000 cattle per year (the Secretary's hypothetical performance for each salesman) or more.[3] None of these agencies, irrespective of volume or personnel, reached the Secretary's hypothetical standard of salesmanship or anything like it. Moreover, 7 of the 26, although, according to the hypothetical standard, already overmanned with regular salesmen, found it necessary to employ 1 and sometimes 2 extra salesmen

---

[3]Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34; see table, Appendix B. The number of cattle and calves sold by these firms range from 28,109 (Ladd Bros. Commission Co.—Agency No. 62) to 138,133 (Swift & Henry Livestock Commission Co.—Agency No. 59).

in the peak season to dispose of the number of cattle consigned to them for sale.[4]

Among the agencies requiring the employment of extra salesmen during such peak season is John Clay & Co. (Agency No. 54) which in 1931 sold 117,345 head of cattle and calves.[5] This agency, ranking second in cattle sales and first in total volume of business in all species, did a gross business in 1931 (measured by the sales receipts rather than by commissions) of $12,267,430.93.[6] It is a partnership the members of which reside in Chicago. All of its sales therefore are made by hired salesmen whose salaries represent out-of-pocket expense.[7] In 1931 it had throughout the year four regular cattle salesmen.[8] Under the Secretary's hypothetical standard these four salesmen should have been able to sell effectively 116,000 head of cattle, almost exactly the number of cattle sold by this agency which was 117,345. John Clay & Co., however, in 1931, employed for the peak season two extra salesmen, one for a period of seven months and the other for a period of four months[8] making a total of six employed

---

[4]*Firm No.*	*Firm Name*	*No. of extra Employed Salesmen*
54	John Clay & Co.	2
10	Producers Commission Co.	1
13	Crider Commission Co.	2
55	Wright & Baucus	1
65	Moffett Commission Co.	1
14	Charles Dixon Commission Co.	2
4	Ragland-Storts & Burrus Commission Co.	1

(Govt. Ex. 115-B, R. Vol. IV, pp. 69, 129, 15, 73, 91, 18, 2; see table, Appendix C.)

[5]Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34; see table, Appendix B.

[6]Res. Ex. 243, R. Vol. III, p. 42; see table, *ante*, p. 56.

[7]Govt. Ex. 115B, R. Vol. IV, p. 69.

[8]*id.*; see table, Appendix C.

to handle during the year that number of cattle which the Secretary has concluded should have been sold by four. There is no finding nor evidence that John Clay & Co. is inefficiently operated or is spending more money in the conduct of its business than is necessary to produce the required results for the grower, *i.e.* the procurement of the highest price possible. But one of two conclusions is inescapable. Either the hypothetical standard is incapable of realization, when considered in the light of the real test and function of salesmanship, or John Clay & Co. hired not only one but two unnecessary salesmen and in so doing wasted its money. There is neither finding nor evidence to support the latter and the former must therefore be accepted.

This single illustration of actual performance versus hypothetical standard should alone be sufficient to demonstrate that the hypothetical standard not only rests purely upon speculation but is unattainable in practice. Here was a firm with sufficient volume and a sufficient number of regular salesmen to meet that standard but which found it incapable of attainment, requiring the employment of two additional salesmen (or an increase of 50% in number) in order to conduct the business. Under the Secretary's rates John Clay & Co. would fail by $3,359.54 to meet the out-of-pocket expense of conducting its business in 1931.[9] There is no finding that the business of this agency was inefficiently conducted. It meets the test of volume included in the "guide adopted" (FF. 114, R. 83). It had enough regular salesmen to reach the hypothetical standard in the disposition of all of the cattle if that standard were capable of attainment. It not only failed to reach the standard but under the Secretary's rates would lose

[9]Pet. Ex. 4, R. Vol. III, p. 6, col. j.

money. Certainly as to this firm, which as nearly as any, if not more so, meets all the requirements of the so-called "guide", the guide was not applied.

The same conclusion as to the speculative and unattainable character of the standard when contrasted with practical experience may be drawn from the sales performance of the agency selling the greatest number of cattle, to wit, Swift & Henry Livestock Commission Company (Agency No. 59). This agency sold 138,133 head of cattle.[10] In this firm two of the owners were full-time salesmen.[11] The Secretary's findings indicate that it should be possible for an efficient salesman to sell even more than the hypothetical standard.[12] If so, with a slight stretch in their performance these two owner-salesmen should have been able to dispose of all the cattle consigned to them (138,133 head) with the assistance of two full-time employed salesmen, an average of a little over 30,000 apiece. Instead they employed throughout the year four regular salesmen, in addition to which one of their buyers devoted 76% of his time to selling,[13] making a total of seven, whereas under the hypothetical standard from four to five only should have been required. Under the Secretary's rates this firm would have left after paying its actual out-of-pocket expenses (including, according to the Secretary, the salaries of at least two salesmen whose services were unnecessary) $1,111.55 to be divided among the owners.[14] Here again

---

[10]Govt. Ex. 115, pp. 65, 66; R. Vol. III, pp. 31-34; see table, Appendix B.

[11]Govt. Ex. 115-B, R. Vol. IV, p. 76; see table, Appendix C.

[12]FF. 143, R. 97.

[13]Govt. Ex. 115-B; R. Vol. IV, p. 76.

[14]Pet. Ex. 4, R. Vol. III, p. 6, col. j. Under the Secretary's formula, this firm is entitled to $3,788.54 for return on the investment. Deducting this from the margin over out-of-pocket expenses at the Secretary's rates would leave this firm with nothing as compensation for the owners devoting their time to the conduct of its business.

we have a firm with sufficient volume to reach the hypothetical standard of the efficiently operated (and there is neither evidence nor finding that it was not), but which was unable to reach the hypothetical standard (although its failure so to do cost its owners out-of-pocket money) and will be left with substantially nothing at the end of the year under the Secretary's rates.

The experience and performance of these two (the largest agencies of all) is typical of all others and the result of the application of the Secretary's rates to the operations of these two representative firms is likewise typical. Moreover, each of these firms sold over 6% of all the cattle sold in 1931 by all the agencies.[14a] Even assuming the elimination of enough agencies to concentrate additional volume in those that remain it is hardly conceivable that the average volume would exceed the volume of business now done by each of these concerns and it is altogether likely that many of the survivors would have a less volume of business. Yet these two firms with sufficient existing volume to meet the Secretary's hypothetical standard were unable to attain it and would lose money under his rates. The conclusion is inescapable that even after the Secretary's order has, as it is intended to do, driven many of these agencies out of business and deprived their owners of a livelihood, the surviving agencies will be unable to attain the hypothetical standard or to earn reasonable compensation or return on investment for their owners.

Of the remaining agencies the Bowles Commission Company (Agency No. 12), like John Clay & Co., uses hired salesmen only, as do the two cooperatives (Producers Commission Company, Agency No. 10, and Farmers

---

[14a]Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34.

Union Livestock Company, Agency No. 36).[14b] According to the Secretary's hypothetical standard, each one of these agencies, selling wholly through hired help, were overmanned, Bowles having three regular salesmen employed to dispose of 59,216 cattle (which, according to the Secretary's hypothetical standard, should have been disposed of by two), Producers Commission and Farmers' Union each having four salesmen, to dispose of 80,863 and 74,364 head, respectively (each of which should have been able to dispose of these cattle with three salesmen at the most), whereas Producers actually employed an extra salesman, in addition to its four regular salesmen, for three months to dispose of theirs.[14c] None of the agencies, therefore, which sold wholly through hired salesmen, attained the hypothetical standard, and each hired more men than would have been necessary had they done so. Yet there is neither evidence nor finding that they were inefficiently operated or wasteful in their expenditures.

In each of the other agencies making up 26 having sufficient volume to reach the hypothetical standard there are owner-salesmen in varying numbers. In but two (Poole-Dempsey-Rutherford—Agency No. 48 and Robinson-Hoover Commission Company—Agency No. 56) did the owners do all of the selling, in each case, however, falling far short of the hypothetical standard, salesmen performance in respect to the first firm being 12,125 head and in respect of the second 14,844.[14d]

[14b]Govt. Ex. 115-B, R. Vol. IV, pp. 13, 129, 134; see table, Appendix C.

[14c]*id.*; Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34; see tables, Appendices B and C.

[14d]Govt. Ex. 115-B, R. Vol. IV, pp. 60, 75; Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34; see tables, Appendices B and C.

All of the other firms selling approximately 29,000 head of cattle a year[15] used both owner-salesmen and salaried salesmen.[16] In some cases under the hypothetical standard one salesman should have been able to sell all the cattle. In all cases more regular salesmen were employed in addition to owner-salesmen than would be required to meet the hypothetical standard, and in the case of five of these agencies,[16a] as well as the cases of John Clay & Co. and Producers Commission Company, already noted, one or more extra salesmen were employed during the peak season.[16b]

---

[15]

Firm No.	*Name of Firm*
59	Swift & Henry Livestock Commission Co.
46	National Livestock Commission Co.
82	Wilson, Egan & Co.
63	Martin, Blomquist & Lee Commission Co.
73	Witherspoon Livestock Commission Co.
84	Cassidy Southwestern Commission Co.
42	Long & Perry Commission Co.
35	Drumm-Standish Commission Co.
13	Crider Commission Co.
71	Ry[illegible]-Robinson Commission Co.
55	Wright & Baucus Co.
18	Haggart, Wilson Commission Co.
83	Burlington Livestock Commission Co.
25	Stuart Gillespie & Co.
65	Moffet Commission Co.
14	Charles Dixon Commission Co.
4	Ragland-Storts & Burrus Commission Co.
70	W. C. Kile Commission Co.
26	Wester Bros. & Smith Commission Co.
62	Laird Bros. Commission Co.

[16]Govt. Ex. 115-B, R. Vol. IV; see table, Appendix C.

[16a]

Firm No.	*Firm Name*
13	Crider Commission Co.
55	Wright & Baucus Co.
65	Moffet Commission Co.
14	Charles Dixon Commission Co.
4	Ragland-Storts & Burrus Commission Co.

[16b]Govt. Ex. 115-B, R. Vol. IV; see table, Appendix C.

It therefore makes no difference whether all the agencies be considered together, or whether particular agencies be chosen for the purpose of testing the hypothetical standard; none attained it, and none could.

Obviously, the remaining agencies selling less than 29,000 head of cattle per year could not be expected to reach the hypothetical standard. This does not mean, however, that their performance is inefficient or their operations wasteful, or that, if they had the requisite number of cattle, they could reach such standard. A single illustration will suffice. The prices received by growers on heavy cattle ranged from $37 per head to $69 per head, a spread of $32.[17] The top price was received for its growers by Agency No. 34, the Warren Cummings Livestock Commission Company, having but a single owner, Warren Cummings, who is a cattle salesman.[18] This agency sold 26,859 head of cattle in the year 1931,[19] which, according to the Secretary's hypothetical standard, should all have been sold effectively by the owner. On the contrary, he employed two additional regular salesmen throughout the year and an extra salesman for a period of three months,[20] but with the result that his growers received the top price. Under the Secretary's rates Mr. Cummings, after paying the cost of operating his agency, will have $2,462.63 left.[21] According to the Secretary's order, he is entitled to $898.31 for a return on the investment of capital employed in the conduct of his business, leaving him $1,564.32 as compensation for selling and supervising the operations of an agency which pro-

---

[17]Res. Ex. 249, R. Vol. III, p. 43.

[18]**Govt. Ex. 115-B, R. Vol. IV, p. 44; see table, Appendix C.**

[19]Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34; see table, Appendix B.

[20]Govt. Ex. 115-B, R. Vol. IV, p. 44; see table, Appendix C.

[21]Pet. Ex. 4, R. Vol. III, p. 6, col. j.

cured for its growers the top price paid at the market.[21a] The question naturally arises, why did Mr. Cummings employ not only two regular salesmen but an extra salesman for a period of four months, to dispose of 27,000 head of cattle, if he himself could have sold them all effectively with the same result. It may be said that if he had had more cattle to sell he and his employees might have sold more with equally satisfactory results. This is again purely speculative. But when his actual performance is added to that of the 26 firms selling approximately 29,000 cattle or more, none of which reached the hypothetical standard of performance, and many of which, although according to such standard already overmanned, found it necessary to employ additional salesmen during the peak season, it would seem to be obvious that the hypothetical standard is not only unsupported by the experience of any agency but is incapable of attainment in practice except, if at all, at the sacrifice of the grower's interests.[21b]

The sales performance of the ten firms selling the largest number of cattle[22] are relatively uniform, making allowance for the variations which must exist in any business, ranging from a low of 14,644 (Witherspoon)

[21a]Pet. Ex. 4, R. Vol. III, p. 6, cols. k and l.

[21b]See also p. 39, footnote 1, *ante*, describing the business of John M. Nichols (Firm No. 9) who obtained the highest proceeds per head for yearling cattle and the second highest for heavy cattle, but who handled far less volume than the Secretary's hypothetical performance.

[22]Agencies Swift & Henry (No. 59), John Clay & Company (No. 54), National Livestock Commission Company (Agency 46), Wilson, Egan & Company (Agency 82), Martin Blomquist & Lee (Agency 63), Producers Commission Association (Agency 10), Farmers Union Livestock Commission Company (Agency 36), Witherspoon (Agency 73), Cassidy Southwestern (Agency 84), Long & Perry (Agency 42). (Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34; see table, Appendix B.)

to a high of 19,733 (Swift & Henry) per salesman for those companies selling wholly through owners or regular salesmen employed throughout the year.[23] John Clay & Company, with four regular salesmen and two extras (one for 4 months and the other for 7 months)[23a] sold 117,345 cattle, or an average of 19,558 cattle for each of the six salesmen employed during the year, or of 23,866 if the two extra salesmen be regarded as the equivalent of 4/12 and 7/12 of a salesman respectively.[23b] Since it took the six salesmen to sell the cattle, the former calculation is more in accordance with actual performance, but if we assume that the extra salesmen, if cattle had been available, could have sold at the same rate throughout the year, the average performance is still but 23,866, or approximately 20% below the hypothetical performance assumed by the Secretary. The other one of the ten which also employed an extra salesman for a portion of the year (Producers Commission Association) sold 80,863 cattle with four regular salesmen and one extra salesman for 3 months. The five salesmen thus averaged 16,173 cattle, or again on the basis of counting the extra salesman as only 3/12 of a salesman, at an average of 19,026.[23c]

Under the Secretary's rates these 10 agencies would fail by $19,521.70 of meeting operating expenses, without any allowance whatever for owner-salesman compensation, supervisory services, or return on investment. The Secretary in his order allows $26,309.88 for return on the investment of these agencies. This added to the foregoing

---

[23]Govt. Ex. 115-B, R. Vol. IV; see tables, Appendices B and C.
[23a]Govt. Ex. 115-B, R. Vol. IV, p. 69; see table, Appendix C.
[23b]Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34; see table Appendix B.
[23c]Notes 23a and 23b, *supra*. See table, Appendices B and C.

figure would produce a total aggregate deficit for these 10 agencies of $45,831.58, with no allowance whatever for the services of owner-salesmen.[24]

Of these 10 agencies the National Livestock Commission Company would make the best showing under the Secretary's rates, which as applied to the 1931 business would leave it $8,247.90[25] to divide among five owners,[26] or $1,649.58 apiece as compensation for their personal services in sales and supervision and for return on investment. The Secretary allows this agency $2,626.98 for the latter purpose,[27] which would leave this firm, ranking third in volume of cattle sold and fourth in results, as judged by returns to the growers,[28] $5,620.92 to compensate 5 owners for their services in selling livestock, or at an average rate of $1,124.18,[29] clearly less than reasonable compensation.

---

[24]Pet. Ex. 4, R. Vol. III, p. 6, cols. j and k.
[25]Pet. Ex. 4, R. Vol. III, p. 6, col. j.
[26]Govt. Ex. 115-B, R. Vol. IV, p. 56.
[27]Pet. Ex. 4, R. Vol. III, p. 6, col. k.
[28]Res. Ex. 249, R. Vol. III, p. 43.
[29]Pet. Ex. 4, R. Vol. III, p. 6, cols. l, m, n.
This is the agency with which Mr. Olander is connected, whose graphic description of his typical day's work and of the care and time consumed in bargaining for the best price have been set out in the statement (pp. 18, 24-27 n, *ante*). As we said in that connection, all the evidence shows that procurement of the best price and not speed or volume is the test of sales efficiency. Measured by this test, this firm ranks among the highest, obtaining on heavy cattle an average of $61.94 per head for its growers as against a high of $68.94 and a low of $36.52 (n. 10, *supra*). It sold 99,113 cattle (Govt. Ex. 115, pp. 65, 66, R. Vol. III, pp. 31-34; see table, Appendix B). Under the Secretary's hypothetical standard it should have been able to dispose of these cattle with four salesmen, instead of which they were sold by three owner salesmen and three salaried salesmen (Govt. Ex. 115-B, R. Vol. IV, p. 56; see table, Appendix C), each of whom cost money. Perhaps if Mr. Olander, his associates and employees had sold with less care and taken less time in bargaining than that disclosed by his evidence, they could have sold these cattle or more with four salesmen. But this is purely speculative. The uncontradicted fact is that to attain these results this firm, with a high

2. The opinion evidence which alone is relied on by the Secretary in estimating reasonable salesmanship performance, if entitled to any weight at all, is thoroughly inadequate to justify the arbitrary discarding of all actual performance.

It is stated in Finding 140 of the Secretary's order (R. 96) that a salesman employed by one of the respondents testified that a good salesman "should sell" 1,500 cars of cattle in a year; that another witness employed by a respondent testified that a good salesman "can sell well" as many as 2,000 cars of cattle annually; that one of the respondents testified that a butcher salesman "could sell" 1,600 cars of butcher cattle in a year, and that he "should be able to sell" that many cars of steers; and that the same witness testified that a hog salesman "should sell" more than 1,600 cars of hogs and that a sheep salesman "should sell" from 1,500 to 2,000 cars of sheep annually.

No witness testified that he, or any other salesman, had sold in such quantities.

The evidence upon which these conclusions are based and upon which their validity depends is the testimony of three witnesses: W. T. Angle, manager of the Producers Commission Association (a cooperative); W. B. Ecton, a salesman for that Association; and John W. Murphy, a salesman for the Bowles Livestock Commission Company.

In reply to the question "how many cars of cattle do you handle in a year?", Murphy testified "Well, off hand,

---

volume and obtaining unusually good prices for its growers, used six salesmen, two more than the Secretary thinks they should have. There is no evidence whatever that a lesser number could have sold the same volume to equal or comparable advantage.

I don't know, *and that would depend on the conditions. One hundred and one things could develop in that"* (R. 325). The witness was then asked, without reference to any particular year, and without reference to the Kansas City or any other stockyards, the leading question whether he had *ever* handled as many as 1,500 cars in one year. He had previously testified that he had entered the commission business and begun the selling of cattle at Denver; that he was in Denver for three years, and then in Sioux City for four years (R. 319). He had previously testified that localized conditions at stockyards affect the facility and volume of sales; and that particularized buying had greatly increased the work and responsibility of salesmen and decreased the rapidity and volume of sales (R. 319-320). The witness answered the question in the affirmative and then promptly corrected himself and said, "Well, off hand, I couldn't tell you how many I have sold" (R. 326). Upon inquiry by the examiner, he said he did not know how many cattle he sold in 1929. In reply to the leading question, "You don't know whether it was 1,500 or 1,000 or not?" he answered "I couldn't say just what it was, because I haven't any recollection of what our business was, that particular year." He also denied his ability to testify as to how many cattle he had sold in 1930 (R. 326).

Being questioned with reference to his opinion as to good salesmanship, he testified that no human being on earth could tell what number a "good" salesman could sell in a year "if he had them to sell." To the question, "Do you think he could handle as many as 1,500 cars and handle them properly?", he first answered affirmatively and then corrected himself to state, ***"Yes, that would depend altogether on market conditions, climatic conditions and the various things that enter into livestock selling"*** (R. 327).

Upon cross-examination, he testified "I could go down to the yards, and if I were just interested in disposing of these cattle at any price I could sell a very large number. *There is a difference between simply getting rid of cattle and really selling them*" (R. 327).

The above testimony was given during the original hearing in 1930 and related to the year 1929. When recalled, the witness testified to a decline in his firm's business between 1929 and 1931; to the continued prospect of a "tremendous" loss in volume of business; to the increased difficulty because of sales cost, falling markets and declining prices (R. 773-774, 776). He also testified that the services of the three salesmen and one buyer employed by his firm during 1931 could not have been dispensed with without loss to its customers (R. 777). And finally, he testified that "Compared with two years ago, it requires a considerable more time to sell cattle on account of the declining market which we have had" (R. 782). At the hearings in 1932 he was not asked to state his opinion of the standard for salesmanship performance; he did testify that conditions in the business had so changed as generally to increase the difficulty of sales (R. 776).

The second of the three witnesses relied upon by the Secretary was W. T. Angle. The qualifications of this witness to give opinion evidence as to salesmanship performance standards are open to question, since he was not a salesman but Manager of the Producers Commission Association; and he admitted, on cross-examination, that he did not sell livestock and had not sold any livestock worth mentioning (R. 343). He asserted that he had given some consideration to the number of cars which a salesman should be able to handle "taking the livestock just as it

comes to the market." But he refused, when asked to state his "views" on the question, "assuming that he [the salesman] could get all he could handle," to state what number of head a good salesman should sell. Instead, he discoursed at length upon the variations and conditions in the market and between various types and grades of cattle. It was only when pressed by the examiner, and in answer to a leading question whether a salesman, if he has that many cattle to sell, could dispose of 1500 carloads in a year, that the witness answered "Yes." (R. 337-340.) And the force of this affirmance, upon which the Secretary relies, completely evaporates when, in elaborating upon his answer, the witness says that the question is really how many buyers will buy from a salesman on a given day and not how much a salesman can sell (R. 340). The witness's refusal to be content with a simple affirmance and his insistence, in an effort to be truthful, upon making assumptions as to the volume of livestock available, the degree of specialization of the salesman in question, the demand for the cattle, and the availability of buyers, clearly indicates that the answer was predicated upon a hypothesis which was not included in the question. And that, for this reason, the answer was not responsive (R. 340).

In fact, the assumptions upon which this witness predicated his opinion as to salesmanship performance were so utopian and so far removed from the fact, that his testimony cannot be said to be evidence at all. There is nothing in the record to show that this inarticulate hypothesis accords with the facts. It is not evidence. It is the vaguest speculation.

Moreover, the witness's optimistic estimates as to what a cattle salesman ought to be able to do are clearly at vari-

ance with what he, as manager, and his board of directors, had been able to obtain from the salesmen in their employ. The witness himself testified that he and the directors were considering the employment of additional salesmen and the further departmentalization of the firm's selling; and that during the year 1929 the cattle salesmen employed by the Producers Commission Association handled only an average of 432 cars (R. 343, 345). Testifying at the rehearing in 1932 the witness further limited the force of his previous testimony by testifying that "There may be some changes in the volume of livestock moving that would affect the decisions that I gave at that time [1930]. The volume of receipts in our market has now changed in some respects and the volume of business we handle on any species of livestock materially affects the cost in handling it" (R. 880). He admits that "the volume of sheep, cattle and hogs going through our marketplace for the years of 1930, 1931 and 1932 was lighter than that in 1929 and the years immediately previous thereto" (R. 880).

The third and last witness upon whose testimony the Secretary relies is W. B. Ecton, a salesman employed by the Producers Commission Association under the management of the witness Angle (R. 363-369).

The testimony of this witness is subject to the same criticisms as that of the witness Angle. It is to be remembered that he is one of the cooperative's salesmen who averaged 432 cars of cattle during the year 1929. It is immediately apparent that the statements of this witness as to the number of cars a salesman ought to be able to sell are made with reference to conditions completely at variance with those actually existing, under which he has himself been able to attain no such standard. His

testimony means little more than that, given ideal conditions with all the variable factors in favor of ease and facility of sale, it is not impossible for a salesman to attain such a standard.

Upon recall at the hearing in 1932, the witness limited the force of his testimony at the original hearing by referring to the effect of the depression upon the actual market and the resultant difficulty of selling cattle. His further testimony upon recall makes it very clear that the volume of sales depends for the most part, not upon the efficiency of salesman but upon the immediate demand for cattle of the type available on the market (R. 789-793).

The volume of sales is not the measure of efficient salesmanship. These opinion witnesses did not testify that it is, and abundant affirmative evidence in the record establishes that it is not. Thus, Fred H. Olander, who has been in the commission business for over 20 years and who is a partner in the National Live Stock Association Company testified (R. 217):

> "It has been my experience that the first bids placed on livestock are much less than I finally get for them. I may have to work all day, and I may have to work a week, and I have worked as long as a week selling one load of cattle. The commission man is interested in getting the highest possible price, and he is willing to work as long as it is necessary to do that."

At R. 219 he testified:

> "I don't hire a salesman on his ability to dispose of cattle. You can sell them at the best possible price as the result of the exercise of your judgment, and then there are salesmen who desire to just get the cattle sold. I don't hire a salesman because he may

have ability to dispose of a good many cattle, but I hire him because I want him to put every ounce of his ability and every pound of his effort into each and every sale that he makes. The matter of volume that he sells does not have any bearing on his salary. The volume of his sales would not determine whether we would continue to carry him, even though we were carrying him at a loss. The factor would be whether he was getting good prices."

Further at R. 220:

"The number of cattle handled by a salesman varies depending upon the class of receipts. * * * There are instances when we may work cattle for two or three days and not get a satisfactory price and then the owner may ship them on to Chicago."

3. The Secretary completely disregarded uncontradicted evidence of numerous uncontrollable and variable factors affecting salesmanship performance.

Any expression of opinion as to quantitative standards for future selling performance necessarily involves a forecast of market conditions. As appears from the discussion under the preceding heading, the so-called opinion evidence, upon which alone the Secretary's findings as to reasonable salesmanship performance were based,[1] was predicated upon the assumed existence of ideal conditions. The record is replete with uncontradicted evidence negating such assumptions and conclusively establishing the existence of variable market conditions such as to render the opinion evidence worthless. In basing his findings upon

[1]FF. 140-143, R. 96-97.

the opinion evidence alone, the Secretary completely disregarded this uncontradicted evidence.

The most obvious variations are those in the receipt of livestock by the Kansas City stockyards and, consequently, in the supply of livestock available to be sold. The Secretary of the Kansas City Stockyards Company, Laurence G. Trickett, characterized this condition as one of the "biggest hazards in conducting both the stockyards and the commission business" (R. 766). He further said:

> "There is no way to ascertain beforehand just how many receipts of any species will come in to a commission firm or to the stock yards. The fact that the Kansas City market is a large stocker and feeder market accentuates the peak receipts in the fall. The fact that the Kansas City market is a larger stocker and feeder market accounts for a greater variation from its normal than exists at other markets such as Chicago. This increases operating costs" (R. 766).

The total receipts of cattle, and the variations therein, during the year 1931 are fairly illustrative of the degree to which and the manner in which the supply of livestock available for sale may vary in any one year. In that year, 1,667,982 head of cattle were received at the Kansas City stockyards. Of that number, 201,489 were received during the month of October. The average receipts per month were 138,998. In other words, during the peak month, October, receipts exceeded average monthly receipts by 41%. Cattle were received on 310 days of the year 1931. The average weekly receipts were 31,989, the largest week being that of October 12 to October 17, during which 51,222 head of cattle were received. This week exceeded

average weekly receipts by approximately 48%. In any week, Monday was by far the heaviest day. The total receipts on Monday for the year were 825,611; the average receipts for each Monday, 15,877. Approximately half of all the cattle received during each week was received on Monday. Average receipts on that day were 2.95 times the average daily receipts, 5,380, and the total receipts on Monday 49.5% of the total annual receipts. Even more impressive were the variations in daily receipts, which averaged 5,380 and ranged to a high of 30,002 head.[2]

The situation is further complicated by the great variety in type and grade of cattle received and handled at the Kansas City market.[3] In his testimony (R. 238), Mr. Olander, Vice-President of the National Livestock Commission Company, stated that the variance in types and grade at the Kansas City market is greater than that at any other. This statement was corroborated by Mr. Murphy, a livestock salesman for the Bowles Livestock Commission Company (R. 325). The ease and facility of sale, and therefore the time necessary for sale, vary as between different grades of livestock.[4] The variation in types and grades of livestock received for sale, and the total irregularity of the volume of receipts, prevents the standardization of salesmanship performance.

A high volume of sales depends upon there being present in the market an immediate buyer demand coincident with and corresponding to the supply of livestock available to be sold. It has been said that supply is irregular and

---

[2]Govt. Ex. 116, R. Vol. III, p. 39; see n. 1, p. 29, *ante*.

[3]R. 220, 223-224, 325, 331, 338, 357, 358, 363, 766, 801, 840.

[4]*id.*

unpredictable both as to volume and character. Demand is no more consistent nor capable of prediction.[5] On a rising market, when demand is active, sales may be accomplished with comparative facility; but on a declining market the rapidity and volume of sales is subject to the delay involved in the search for buyers and in bargaining over the terms of sale.[6] The time thus spent cannot be sacrificed to increased volume without a sacrifice of the interests of the producer.

Purchases at the Kansas City market have become increasingly particularized, being made in small quantities and with reference to the immediate needs of the purchasers. For this reason they require sorting and grading of livestock before purchase. These are factors which tend to slow up and to decrease the volume of sales.[7]

The difficulty of sales does not vary with the number of livestock sold alone.[8] Other things being equal, it is as difficult to sell 5 as 50 head. The testimony of Mr. Trickett upon this point is again helpful, as is that of Mr. Henderson, office manager for the Moffett Livestock Commission Company. Mr. Trickett testified (R. 762):

> "Just as much time and effort and work are required in handling the small number of head, 5 head, as is required in handling the large number of head.

---

[5]R. 224-225, 239, 360, 752, 755, 756, 791.

[6]FF. 65, R. 55; R. 207, 755-756, 776-777, 782, 792-793, 803, 965.

[7]In Finding 28 (R. 40) the Secretary said that "increasingly respondents' business has taken on more of the aspects of the retail handling of a commodity." This conclusion is not, however, reflected in his allowance for salesmanship performance, in spite of the uncontradicted evidence which supports it, and which points out the effect which this change in the nature of the business has had on possible salesmanship performance. R. 306-307, 319, 324, 331, 663, 752, 776-777, 790, 792, 841, 922.

[8]R. 328, 364.

> Usually there is just as much time required of the commission men to sell 5 head as there would be to sell a large shipment by rail. In the handling of the small lots it is necessary to keep the ownership separated, it requires just as much man power and labor to handle 5 head as it would to handle the larger number of head."

Mr. Henderson testified (R. 315):

> "It is just as easy to sell 20 steers as it is to sell one calf and sometimes it is easier. If you have a carload of fat cattle and a packer comes in and wants them you can sell them in two minutes. You may haggle with this one calf for half an hour or half a day."

Volume and facility of sales are, however, adversely affected by the lack of uniformity in grade and type, and of identity in ownership. Consignments which are mixed as to either grade, type or ownership require more thorough grading and sorting before sale, and identification throughout negotiation, sale and delivery.[9] Mixed consignments to the Kansas City market, both as to grade and ownership, have increased.[10] The volume of livestock received by truck, which is usually mixed, as to grade, type and ownership, has also greatly increased.[11] The degree to which these tendencies prevail is a definite factor affecting future salesmanship performance. Consignments have been smaller, proportionately to total volume.[12] These facts all result in smaller drafts and, therefore, in decreased volume of sales.[13]

---

[9]R. 317, 338-339, 364-365, 442, 528, 540-541.

[10]FF. 23-24, R. 38; R. 442, 509-510, 540-541, 603, 609, 727-728, 967, 1047.

[11]FF. 26, R. 38-39; R. 280-281, 304-305, 431, 464, 510, 612, 706, 709, 727-728, 762-763, 769, 774, 1047.

[12]R. 317, 509-510, 540-541, 603, 609, 790, 1035, 1045.

[13]FF. 28, R. 40; R. 306, 612.

031

4. In determining so-called reasonable cost of salesmanship the Secretary acted arbitrarily, without evidence, failed to follow the principle applied in the Tagg Brothers case and applied a standard at variance with the purposes and objects of the Act.

The evidence of the witnesses relied upon by the Secretary and reviewed above, vague, uncertain and qualified as it is, hardly rises to the dignity of opinion evidence. It is clearly at variance with actual experience and as clearly ignores the conditions under which cattle are actually sold. In accepting it the Secretary has substituted speculative prophecy for actual experience as the test of sales performance. The evidence relied on is certainly insufficient to overcome the evidence, hereinbefore reviewed, of actual performance. It is the general rule that the finding of an administrative body or officer will not be disturbed if sustained by the evidence. This, however, does not mean the existence of some evidence, in the mind of such officer sufficient. If the record as a whole is such that the verdict of a jury based thereon would be compelled to be set aside in any jurisdiction, except where the scintilla of evidence rule prevails, the finding of an administrative officer on the same kind of a record is clearly entitled to no greater weight. We doubt whether even in those limited jurisdictions where the scintilla of evidence rule prevails a verdict of a jury as to the test of salesmanship performance similar to that rendered by the Secretary would be permitted to stand.

However that may be, the applicable rule in this Court is that an administrative finding may not be supported upon the basis of the scintilla rule[1]; and it is further the estab-

---

[1] *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547-548.

lished doctrine that it is arbitrary action for an administrative body to base a rate order upon prophetic evidence which is at war with evidence of actual experience[2]. The findings of the Secretary in this case in respect of salesmanship performance offend both of these rules, as well as the rule requiring that rate orders be made in consideration of their actual effect in practice[3].

If the officers of one of these agencies, which is a corporation, or the partner in one of these agencies which is a partnership, were being sued for waste, and should be found guilty thereof by a jury on a record such as was before the Secretary, no Court in this country would permit such a verdict to stand, based as it would be upon pure hypothesis and contrary, as it would be, to all practical experience. As we have said before, this is not a case where the Secretary, in the exercise of his administrative discretion, has adopted a standard of performance reached by some but not by all. He has adopted a hypothetical standard reached by none, and according to the conclusions necessarily to be drawn from the record, unattainable by any. His only justification can be that if there were less firms in the business their salesmen might sell more cattle. But this is wholly speculative, particularly when tested in the light of the actual experience of the most efficient firms, having the largest volume of business and under every incentive to keep down costs. These, like the others, have failed to reach the standard set and for the very good reason, as appears from all the uncontradicted testimony, that sales performance does not depend upon volume but upon a multitude of other factors entering into the accomplishment of the salesman's duty,

---

[2]*West* v. *Public Utility Commission*, 294 U. S. 79, 82.
[3]*Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 160.

which is not to sell all the cattle that he can, but to get the best price that he can. This factor the Secretary has wholly ignored.

Nor has the Secretary followed the standard set up by himself in his own findings and order, which recite:

> "The guide adopted in this case is that under ordinary conditions as they prevail on the Kansas City market, a schedule of rates should be high enough to produce sufficient gross revenues to pay all reasonable costs and a reasonable compensation for management and risk, that is, a reasonable profit, to the owner or owners of any firm which receives enough livestock to enable it[1] handle its business in a reasonably efficient and economic manner".[2]

As we have repeatedly pointed out, there are many firms having a sufficient volume to handle their business in a reasonably efficient and economic manner, and to reach the Secretary's hypothetical standard, but none have done so. Instead of allowing as the reasonable cost of salesmanship expenses incurred "under ordinary conditions as they prevail on the Kansas City market" and providing "a schedule of rates * * * high enough * * * to pay all such reasonable costs", he has ignored actual conditions and all actual experience and established rates predicated upon purely hypothetical cost.

It is said in the same finding that the principle set forth in the "guide" stated was followed in the *Omaha Commission Rate Case* and approved in *Tagg Brothers* v. *United States,* 280 U. S. 420.

As pointed out in the opinion of the District Court in

---

[1] *Sic.*

[2] FF. 114, R. 83.

the *Tagg Brothers* case[3], the Secretary there did not act "on any mere theoretical estimation, but on actual experience as disclosed by the evidence" (29 Fed. (2d) at p. 755). The fact that the Secretary used typical experience in making his allowances in the *Tagg* case has also been adverted to by the majority of the court below in this case (R. 165). An examination of the record of the *Tagg* case in this Court (No. 45, Oct. Term, 1929) shows that the avowed plan which the Secretary followed as stated in his findings in determining allowable costs was to adopt "a normal of the actual cost of the particular item to those firms whose financial condition exhibits ordinary efficient management of their business" (FF. 14, R. 32 of *Tagg* record). In respect of salesmanship, the Secretary in that case notes in his findings that opinion evidence as to performance was presented, and that such opinion evidence placed the annual number of cars that a salesman could sell at more than two to three times higher than the performance adopted by the Secretary as standard (FF. 16-18, R. 32-34, *id.*), just as the opinion evidence in this case places the performance many times higher than actual experience justifies. In that case, also, the Secretary had evidence of the actual performance of salesmen (FF. 17, R. 33, *id.*). This performance he classified by groups of firms according to volume, giving weight to performance in groups in which the salesmen, by reason of volume or of lesser number of salesmen, had best opportunity to display their ability (*id.*). The allowance made for salesmanship cost (FF. 18, R. 33-34, *id.*) has close relation to the actual performance figures found in Finding 17 in that case, the performance figures taken by the Secretary being reached or approached

[3]29 F. (2d) 750.

by a substantial number of salesmen in that case. Not so here.

The Secretary's allowances for cost of cattle salesmanship are also at variance with one of the main purposes of the Act, and consequently involve the application of a standard not contemplated thereby. One of the chief purposes of the Act was to insure the receipt of adequate prices by the growers, free from monopolistic practices and manipulation.

As we have said in the statement, the only social or economic justification for these market agencies, aside from their own selfish interests, is in the procurement of the best possible price for the grower. The evidence in this case establishes without contradiction that the test of sales performance is not volume or speed, but the price obtained. It also discloses that the speed with which sales may be made, and a satisfactory price obtained, are influenced by a multitude of considerations beyond the control of the seller. Among these are the day-to-day attitude of buyers, the volume of daily receipts, the character of the demand, whether brisk or sluggish, the size of the "drafts" sold, the ever-increasing tendency towards mixed shipments of different grades and an increase in drive-ins.[4] As well put by one of the very witnesses on whose evidence the Secretary relies, the number of cattle which a salesman can handle in a year "would depend upon the conditions. One hundred and one things could develop" (R. 325); and again at R. 327:

> "I could go down to the yards, and if I were just interested in disposing of these cattle at any price I could sell a very large number. *There is a difference*

[4] *Ante*, p. 129.

between simply getting rid of cattle and really selling them."

The Secretary in accepting volume as the test of sales performance has ignored alike the purpose of the sale and the purpose of the Act. He has thus set up a standard not only unattained and unattainable in practice, but one which ignores the real function of the salesman and the interests of the grower, whose protection was one of the chief objects for which the statute was enacted.

The Secretary's hypothetical standard of cattle salesmanship is thus demonstrated to be unsupported by and at variance with actual performance, however judged, and, when the uncontradicted facts recited above are considered as a whole, to be demonstrably unattainable under the conditions existing at the Kansas City market. As we have said before, there is neither evidence nor finding that any of these agencies are operated inefficiently or wastefully.

5. The salesmanship allowance on hogs and sheep is also based on the adoption of a hypothetical standard, arbitrary and below cost.

The hypothetical standard set for hogs (85,000 head per annum)[1] was also not reached in 1931 by any of the firms, some of whom had one hog salesman and others two. The three agencies coming nearest thereto were Kennaley (Agency No. 51), Martin, Blomquist & Lee (Agency No. 63), and Farmers Union Livestock Commission Company, a cooperative (Agency 36), selling respectively 159,184, 150,806 and 147,922 hogs.[2] As we have already pointed

[1]FF. 143, R. 97.

[2]Govt. Ex. 115, p. 67, R. Vol. III, p. 35; see table, Appendix B.

out, the accuracy of Kennaley's cost figures is seriously open to question, since he is no longer in business.[3] Moreover, as further pointed out, he himself said that he had more hogs than he could sell to the best advantage of the shipper.

Martin, Blomquist & Lee sold 150,806 hogs with the use of two salesmen, or an average of 75,403 hogs per salesman.[4] It also did a substantial sheep business and ranked fifth in cattle sales. It is therefore included among the ten ranking first in the sales of cattle, while it ranks second in the sales of hogs and well up in the sales of sheep. Under the Secretary's rates it would have left, after paying all out-of-pocket expenses, including the salaries of hired salesmen, $2,419.08 as owners' compensation and as return on investment. For the latter, the Secretary's order recognizes an allowance of $3,159.28, which so allocated would leave the seven members of this firm without any compensation whatsoever for their own personal services in the sale of livestock and supervision of the business. Eliminating the allowance for return on the investment altogether, each of the seven would receive as compensation for his services a little more than $300 per year.[5]

The only other firm which came within striking distance of the Secretary's hypothetical standard for hog salesmanship is the cooperative Farmers Union Livestock Commission Company, selling 147,922 hogs.[6] For this purpose it employs two hog salesmen selling an average of 73,961 hogs per annum.[7] These two salesmen, however, were

---

[3]See *supra*, p. 15.

[4]n. 2, *supra*; Govt. Ex. 115-B, R. Vol. IV, p. 86; see tables, Appendices B and C.

[5]Pet. Ex. 4, R. Vol. III, p. 6, cols. j, k, l, m.

[6]n. 2, *supra*.

[7]n. 4, *supra*.

assisted by five yardmen, for whose services no selling allowance whatever has been made by the Secretary.[8] Moreover, while the Secretary bases his hog salesmanship allowance upon a finding, without evidence, that $3,000 a year is a reasonable annual salary for a hog salesman,[9] this concern, one of the three most nearly approaching the Secretary's theoretical standard of salesmanship, paid its head hog salesman $8,800 a year.[10] There is other evidence that this allowance for the value of a hog salesman's services is clearly inadequate and purely arbitrary.

The Secretary's hypothetical performance for sheep salesmanship (250,000 head)[11] was theoretically reached by only one agency (John Clay & Company, No. 54), which sold 591,028 head of sheep with the use of two salesmen or an apparent average of 295,514 sheep per man.[12] These salesmen, however, were assisted by a sheep yardman in selling during peak periods (R. 459) for whose services in selling no allowance has been made in the Secretary's ascertainment of so-called reasonable cost. Moreover, as we have already pointed out, John Clay & Company would fail to earn out-of-pocket expenses under the rates prescribed by the Secretary's order. Other representative sheep firms with substantial volume and with the highest performance per salesman are Swift & Henry (Agency No. 59), Cassidy-Southwestern Commission Company (Agency No. 84) and W. M. Leitch Commission Company (Agency No. 44). The last named agency is engaged

---

[8]FF. 115, R. 83-84; Govt. Ex. 115-B, R. Vol. IV, p. 134.
[9]FF. 143, R. 97.
[10]Govt. Ex. 115-B, R. Vol. IV, p. 134.
[11]FF. 143, R. 97.
[12]Govt. Ex. 115, p. 68, R. Vol. III, p. 37; Govt. Ex. 115-B, R. Vol. IV, p. 69; see tables, Appendices B and C.

exclusively in the sale of sheep, and at the Secretary's rates would earn $9,564.85, without allowance for return on the investment, or after such allowance, $8,495.29, or at the rate of $4,247.65 for each of its four owners for their services.[13] Of the other two, as we have already pointed out, Swift & Henry would barely make expenses at the Secretary's rates, although it has perhaps the best balanced business of any agency at the yards, ranking first in cattle sales, fifth in hog sales, and third in sheep sales. Cassidy-Southwestern Commission Company, likewise one of the first 10 in cattle sales, and fourth in sheep sales, would have left $4,543.81 for owners' compensation and return on investment and, after deduction of the Secretary's allowance for the latter ($1,698.88) $2,844.93 to compensate three owners for their own personal services, or at the rate of $948.31.[14]

While the Secretary's hypothetical performance was therefore more nearly reached on hogs and sheep than on cattle, it is obvious that the rates fixed are wholly inadequate, whether considered in relation to the agencies as a whole or those handling a substantial volume of business. The fact that one exclusive sheep agency may earn $4000 per owner for personal services, while none of the other leading sheep agencies having a large volume will earn anything, is certainly insufficient support either for the rates fixed or for the hypotheses upon which they are based.

---

[13]Pet. Ex. 4, R. Vol. III, p. 6, cols. j, l, n.

[14]n. 13, *supra;* Govt. Ex. 115, pp. 65, 66, 67, 68, R. Vol. III, pp. 31-38.

POINT V.

THE ALLOWANCE FOR BUSINESS-GETTING AND MAINTAINING EXPENSE IS BASED UPON SPECULATION AND HYPOTHESIS, IS ARBITRARY AND CAPRICIOUS, AND IS NOT SUPPORTED BY EVIDENCE OR FINDING.

The order allows as reasonable unit costs for "business-getting and maintaining" an amount equal to 10% of the total costs and profits found by the order to be reasonable.[1] The amount of this allowance per head is as follows:[2]

Cattle and Calves	$ .0450
Hogs	.0180
Sheep	.0059

These allowances, when applied to the actual volume of business handled by the 61 market agencies in 1931,[3] give an aggregate figure for all species of $147,218.31.[4] On the other hand, the Government accountant Bachmann found that business-getting and maintaining expense amounted in 1931 to $283,756.40 excluding salary expense.[5] In this

---

[1]FF. 148, R. 110.

[2]FF. 163, R. 122.

[3]Cattle and Calves, 2,489,772 head (Govt. Ex. 115, p. 4, R. Vol. III, p. 19); Hogs, 1,289,623 head (Govt. Ex. 115, p. 5, R. Vol. III, p. 20); Sheep 2,028,026 head (Govt. Ex. 115, p. 6, R. Vol. III, p. 22). These amounts include the business done by the two cooperative market agencies.

[4]Cattle and Calves, $112,039.74; Hogs, $23,213.21; Sheep, $11,965.35.

[5]Govt. Ex. 115, p. 24, R. Vol. III, p. 29. The allowance in the order for business-getting and maintaining does not purport to provide for salary expense, since salaries are not broken down in the order as they were in the accountant's study (FF. 115, R. 84; see pp. 34-35, *ante*). The accountant's figure of $283,756.40 for non-salary business-getting and maintaining expense rather than his figure of $471,953 for combined salary and non-salary business-getting and maintaining expense, is therefore comparable to the allowance.

item alone, therefore, the allowance made by the order is $136,538.09, or 48%, less than the actual 1931 costs as found by the Government accountant. This drastic reduction warrants special consideration of this particular item.

Although the section of the order purporting to set forth the bases for reducing the allowance for business-getting and maintaining contains a detailed statement of the actual cost per head for each species for each firm,[1] this section of the order does not state what elements enter into this item of cost. However, since the detailed per head costs there given are the same as those found in the Government's accountants' cost study for 1931, it is apparent that the Secretary's allowance for business-getting and maintaining is intended to amount to what the Secretary considers to be a "reasonable" allowance for the same elements that enter into the Government's accountants' figures. The Government's accountants' breakdown of business-getting and maintaining cost[2] reveals what these elements are and their amounts:

Advertising	$131,189.30
Travel	112,569.96
Operation of auto	10,550.17
Auto depreciation	4,629.75
Local and miscellaneous entertainment	3,103.58
Exchange soliciting and membership dues	21,713.64
Total	$283,756.40[3]

No further statistical breakdown of these amounts was given by the Government accountant or appears in the

[1] FF. 148; R. 104.

[2] Govt. Ex. 115, p. 24, R. Vol. III, p. 29.

[3] Each of these items excludes salaries, but purports to include all other items of cost.

record. However, the testimony of the Government accountant, Bachman, throws light upon the nature of these expenses and his reasons for including them under the heading "Business Getting and Maintaining." He testified that the amount for "advertising" includes "newspaper ads, circular letters, postage, specialties and novelties, signs of various kinds and other miscellaneous items. Under newspaper and magazines the figure incorporated in this total of advertising expenses is $13,611.31." [1] Since there is no evidence in the record that the expense for "specialties and novelties, signs of various kinds and other miscellaneous items" is of substantial amount, it is evident that the greater part of the so-called "advertising" expense is spent upon "circular letters" and postage which is used for circular letters.[1a] By "circular letters" the accountant apparently means what is more commonly called "market reports." The items of travel, auto operation, and auto depreciation, are shown by the accountant's testimony to have been included in business-getting and maintaining expense because they were incurred in the country trips which salesmen make to their customers.[2] The item of "Exchange soliciting and membership dues" is shown by the accountant's testimony to include all payments made by members of the Exchange,[3] other than payments for specific services by the Exchange to particular market agencies, and to have been included as business getting and maintaining expense on the ground that a part thereof is attributable to the Exchange's

---

[1] R. 859.

[1a] See *e.g.*, R. 924.

[2] R. 862.

[3] The order contains a finding (FF. 99, R. 78) stating that the Exchange is a registered market agency and that "the reasonableness of its rates for services is not a subject of inquiry" in this proceeding. These costs were allowed in full in the *Tagg* case.

radio program of market information.[4] It appears, therefore, that 45% of actual business getting and maintaining expense relates to country trips, 8% relates to the Exchange, and the major part of the remaining 47% relates to market letters.

The above appears to exhaust the statistical material available to the Secretary in determining what constitutes a "reasonable" allowance for business getting and maintaining. However, the order shows upon its face that no use was made of this statistical material.

On the contrary, the Secretary, without evidence or evidentiary finding for its support, concludes that the total allowance for "business getting and maintaining expense" should be 10% of all other so-called reasonable cost. The basis upon which this overhead allowance was determined is not stated. It is on its face purely arbitrary.

The effect of this arbitrary overhead allowance of 10% is to cut the so-called reasonable cost of the several items

---

[4]The witness stated with respect to this item: "That items cover the charge for the running expenses of the exchange, radio, the rate hearing, and possibly some other items. The proportion of that expense for radio and for the time of the secretary spent in broadcasting and getting his information together for broadcasting is, in my [fol. 1201] opinion, a proper business-getting and maintaining expense. Other parts of this amount may not be properly classified under that heading * * *" (R. 828). By "rate hearing" the witness meant the previous hearing in 1930 (R. 854).

The witness also stated: "I do not think that the Exchange solicits for any individual members and do not have any field men out soliciting business that I know of. The only activity of that kind that I know of would be the cost of the radio market reports and the cost of salaries and gathering information and making the broadcast. I would classify it under a broad definition of soliciting expense. I do not know whether I would classify the bulletin board in the lobby as soliciting expense" (R. 854).

He also stated that the item included assessments by the Exchange "for the transportation fund," (R. 862), *i.e.*, for funds used by the Exchange in taking measures to prevent railroad discrimination against the Kansas City market (R. 266, 704, 1067-1069).

making up the aggregate out-of-pocket expense for "business-getting and maintaining" to one-half of those actually incurred, without explanation as to expenses included or the extent to which those incurred in respect of any particular item are excessive. Nor is there either evidence or evidentiary finding upon which such eliminations or reductions can be predicated. The basis for this arbitrary cutting in two of the out-of-pocket expenses for the various purposes indicated rests solely in the inner consciousness of the Secretary, which we assume the Government will undertake to support by the contention that it represents his "informed judgment". But even a Cabinet Officer, acting in a rate-making capacity affecting the livelihood of citizens engaged in the performance of a useful public service, must have some factual foundation for his action, and his conclusions must be supported both by evidence and evidentiary findings, of which in this case there are neither.

A comparison of the amount allowed with the distribution of the expenses covered by this item as determined by the Government's own accountants, discloses some startling results of this supposed exercise of "informed judgment" by the Secretary.

As pointed out, the effect is to reduce the allowance by nearly one-half of the aggregate cost of this item of expense as a whole. The Government's accountants' own breakdown of the item as a whole into its component parts (p. 140, *ante*) discloses that approximately one-half is represented by so-called advertising expense, and the other half by the out-of-pocket costs of country trips, represented by travel, "operation of autos" and "auto depreciation." As pointed out in the statement, the expense of these country

contacts are not, primarily, incurred for the purpose of persuading shippers to send their live stock to a given agency, but for the purpose of advising growers as to the shipment and care of their cattle, and of becoming acquainted at first hand with the cattle, the conditions under which grown and fed, etc., all for the purpose of procuring for the grower a better price (Statement, pp. 21-23, *ante*). As also disclosed in the Statement, it is conceded that this service is of advantage to the grower, although performed at the expense of the agency, and it is not claimed that more of this service is performed than is desirable in the interest of the grower. On the contrary, the complaint, if any, is that too little of this service is furnished. As we have observed in the Statement, while these expenses, roughly approximating the entire amount of the Secretary's reduction, may in one sense be properly classified as a part of the cost of maintaining business, they are more properly a cost incident to intelligent and efficient selling, and should have been allowed in full. Had this been done the Secretary's arbitrary allowance of 10% of all other so-called reasonable costs for all "business getting and maintaining expense" would have left but $10,000 to cover advertising and maintenance of the Exchange. The actual expenses incurred for the first purpose aggregated $131,189.30, and for the second purpose $21,713.64. On the other hand, if the Secretary intended that his allowance should cover the expenses of advertising and exchange maintenance, it would leave nothing for the maintenance of these essential country contracts.

Moreover, as previously pointed out in the statement (p. 141, *ante*), the greater part of the so-called "advertising expense" is spent upon "market reports" and the postage thereon. These agency market reports do not du-

plicate official reports, but contain general market information, comments upon marketing problems, and information about particular matters of interest to particular growers, such, for example, as information about particular sales of cattle coming from the same neighborhood or of the same general kind and quality, one of the chief purposes of which is to enable the seller to form an opinion as to the worth of his own cattle and of the time when they should be shipped, concerning which advice is also given from time to time by the agency. While the furnishing of these reports, therefore, carries with it an element of advertising, they are sent out to customers of the agency primarily for the purpose of conveying to him such information as will be useful to him in timing his shipments so as to get the best price, and of affording him a reliable check on the prices he actually receives. In disregarding this as an allowable element of expense, as in setting up volume and speed of sales as the test of salesmanship performance, the Secretary has again completely ignored the interests of the grower and the purpose for which the expenditures actually incurred were made.[1]

Neither the evidence nor the evidentiary findings support the reduction to any degree of the expenses actually incurred and classified by the Government's accountant as the cost of "business-getting and maintaining," itself a misnomer. Certainly there is no factual foundation for cutting

---

[1]The only portion of the business-getting and maintaining expense that can be considered purely advertising rather than a form of service mutually advantageous to agency and grower is that portion which can be attributed to newspaper advertising, specialities and novelties, signs of various kinds, local and miscellaneous expenses, the precise amount of which is not disclosed, but which in the aggregate is insignificant (see p. 141, *ante*).

this item in half, and the findings leave wholly to speculation the expenses intended to be included therein or, if all items of expense are to be included therein, the extent to which any are excessive.

The Secretary sagely remarks that the allowance of an "excessive expenditure" would be merely to charge the shipper "to have himself persuaded to send his live stock to one commission firm rather than to another."[5] But, as appears from the foregoing, persuasion of this character is not the primary occasion for these expenditures. Nor, to the extent that this element may enter, do either the evidence or the evidentiary findings disclose to what extent they are attributable to this cause and to what extent they are a part of the expenses incurred for the purpose of procuring for the grower a better price both through country contacts and the dissemination of useful information.

The 10% overhead allowance for the aggregation of items included under the functional cost now under review is therefore purely arbitrary. It rests solely in the *ipse dixit* of the Secretary without even the pretext of opinion evidence in its support. Apparently for the purpose of giving an appearance of verisimilitude to the allowance made, the Government's accountants' allocation of the cost per head for this aggregation of expenses for each firm and for each species of cattle is solemnly set out in the findings, but the Secretary's conclusion does not even pretend to be based upon these figures. As distinguished from the *Tagg Bros.* case in which the allowances were "a normal of the *actual* cost of the particular item in their business," the allowance is purely arbitrary, as any overhead allowance of a given percentage must be.

---

[5]FF. 148, R. 110.

If the expenses making up this item were an insignificant part of the total, the arbitrary adoption of an overhead percentage might not constitute a material infirmity in the order. According to the actual costs as recognized by the Secretary himself, however, the reduction amounts to $136,538.09. The drastic reduction thus improperly made, therefore, not only affects the integrity of the Secretary's pseudo-determination of so-called reasonable cost, but its complete disregard of actual expenditures and the arbitrary basis upon which the allowance is predicated in themselves discloses the purely hypothetical and speculative character of his whole pretended cost determination and of the rates prescribed.

Moreover, there is no reason whatsoever to suppose that the reduction in rates ordered by the Secretary will result in fact in the elimination of one cent of actual expenditure for business-getting and maintaining.

If this order goes into effect, there will be a number of market agencies, including the cooperative associations who have been advised and encouraged in these very business-getting and maintaining activities by the Secretary (Dept. of Agriculture' Technical Bulletin No. 57, Res. Ex. 18), still doing business at the Kansas City stockyards, even after those driven out of business by the lower rates are eliminated. Each of these market agencies will still individually need customers in order to stay in business and if, in 1931, it was, from the standpoint of prudent management, sound business practice to engage in business-getting efforts, it will continue to be sound business practice to engage in business-getting efforts. Whether or not the reduced revenue of the market agencies will be reflected in a reduced expense for business-getting and

maintaining will depend upon the business judgment of each of the individual firms remaining in business. There is every reason to suppose that those firms, faced with the necessity of cutting costs in some way, will cut them in a way that will reduce the efficiency of their service to the producer, rather than cut them in a way which will result in their having no customers.

POINT VI.

THE ALLOWANCES AND FINDINGS FOR YARDING AND OFFICE SALARY COSTS ARE INVALID BECAUSE BASED UPON ARBITRARY, UNSOUND AND CAPRICIOUS FUNCTIONAL COST ALLOCATIONS.

1. The functional cost tables upon which the allowances purport to be based are wholly at variance with the costs as ascertained and reported by the Government accountants.

As has been stated the Secretary's ultimate findings of "reasonable costs" include allowances for yarding and office salary costs.[1] Such allowances are in recess of the Government's accountants' costs for the same functions by an aggregate of $81,638.97 in respect of yarding salaries and $20,088.35 in respect of office salaries.[2]

The answer of defendants referring to the separation or allocation of costs into functional accounts states (R. 142):

> "* * * defendants say that the business of petitioner market agencies naturally divides itself into such functional divisions; that such divisions were followed by the accountant who testified for petitioner market agencies; and that such functional division for the purpose of determining costs is not affected by the fact that the same men commonly perform several different functions. Defendants further say that such separation of costs into functional costs is not arbitrary and that it does not vary from the facts of the business of petitioner market agencies."

---

[1]FF. 163, R. 121-122.
[2]Pet. Ex. 7, R. Vol. III, p. 9.

The cost tables in the order constitute the Secretary's evidentiary fact findings and purport to have been used in the determination of normal or "reasonable costs". They consist of figures set out in tabular form purporting to be estimates of actual cost for yarding and office salaries for individual firms (FF. 144, 146, R. 98, 100).

The following comparisons of these tables conclusively establish the absence of any probative relation between the figures comprising these findings and the Government's accountants' cost estimates for these items. We insert only the comparison as to yarding salaries with respect to cattle and calves. Similar tables of comparisons made with respect to other species and with respect to office salaries for all species show a divergence between the cost tables appearing in the order and the Government's accountants' figures equal in percentage and relative degrees of divergence between agencies to the comparisons made in respect of cattle and calves set out as follows:

YARDING SALARIES

Cattle and Calves

Firm No.	Government[3] Accountant's Salary Cost per Head (Gov't Ex. 115)	Salary Cost per Head as Set up by Order (F. 144, R. 98)	% of Divergence, Secretary's from Gov't Accountant's Figures
66	$.0451	$.0064	86%
34	.0694	.0129	81
67	.2814	.0140	95
79	.1155	.0278	76
83	.0544	.0279	49
15	.1200	.0311	74
9	.0388	.0388	—
87	.0395	.0395	—

[3]Govt. Ex. 115, p. 7, R. Vol. III, p. 23.

Firm No.	Government Accountant's Salary Cost per Head	Salary Cost per Head as Set up by Order	% of Divergence, Secretary's from Gov't Accountant's Figures
35	.1238	.0400	68
30	.0935	.0425	55
54	.0695	.0481	31
61	.1027	.0489	52
37	.1105	.0490	56
53	.1019	.0496	51
70	.1200	.0517	57
73	.0901	.0531	41
56	.1085	.0535	51
42	.0803	.0565	30
60	.1149	.0584	49
46	.0735	.0619	16
74	.1088	.0621	43
52	.0820	.0642	22
18	.1044	.0650	38
48	.1152	.0665	42
62	.0872	.0666	24
55	.1086	.0676	38
23	.0801	.0682	15
33	.1814	.0695	62
16	.0919	.0699	24
14	.1458	.0706	52
12	.0774	.0711	8
26	.1173	.0719	39
65	.0964	.0720	25
63	.0844	.0721	14
75	.1467	.0746	49
10	.0766	.0781	2*
59	.0870	.0784	10
20	.1113	.0811	27
71	.1127	.0818	27

*Indicates Secretary's cost per head larger than that of Government's accountant.

Firm No.	Government Accountant's Salary Cost per Head	Salary Cost per Head as Set forth in Order	% of Divergence, Secretary's from Gov't Accountant's Figures
6	.0863	.0830	4
25	.1099	.0840	24
51	.1158	.0849	27
29	.1470	.0880	40
4	.0952	.0895	6
82	.1248	.1015	19
36	.1023	.1023	—
84	.1096	.1044	5
19	.1518	.1112	27
78	.1120	.1139	2*
72	.1681	.1206	28
77	.1497	.1230	18
13	.1276	.1285	1*
7	.1440	.1353	6
17	.1252	.1399	10*
76	.1791	.1635	8
11	.2130	.2130	—

2. These functional cost tables upon which the Secretary's allowances purport to be based are not supported by other cost evidence in the record, but are figures unrelated to any true functional cost allocation.

In addition to the Government's accountants' cost estimates, the record contains appellants' cost estimates and cost information elicited by a questionnaire[1] issued by the Government. There is no correspondence whatsoever between the Secretary's evidentiary findings, the appellants' functional cost tables (Pet. Ex. 7) or the cost tables pre-

*Indicates Secretary's cost per head larger than that of Government's accountant.

[1]Govt. Ex. 115-B, R. Vol. IV.

pared and offered in evidence by the Government's Accountants Bachmann and Burns (Govt. Ex. 115). The statement preceding and introducing the cost tables in the order would lead the reader to assume that they are the costs found to exist in the Government accounts.[2] The percentages of divergence above set forth do not fully depict the actual differences. It will be seen by a comparison of the unit cost of yarding salaries in respect of cattle that the Government's Accountants' cost in the case of Firm No. 67 is $.2814 while the Order gives the same cost as .014. The Government's Accountants' cost figure is more than twenty-five times the figure for the same item given by the Order. It is evident that a drastic recalculation has occurred. Both figures cannot be correct. There is to be observed from this table the extent to which different methods of cost allocation can vary the results—and it is these evidentiary findings which the Secretary purports to use to inform his judgment. No findings in the order explain the processes employed. No definitive statement appears challenging the accuracy of the accountants' cost allocations. The statement contained in the order that salesmanship costs are not distributed to functional accounts neither corresponds to the averment contained in defendants' answer nor is it supported by analysis of the substituted cost tables set out in the order.

In Finding 115 (R. 83, 84) appears a statement directly at variance with the averment above quoted from the answer of defendants filed herein:

> "Therefore, in the distribution of costs hereinafter made to functional accounts, the services of a salesman, for instance, are not divided as between selling, yarding, office work and business getting

[2]FF. 144, 146, R. 98, 100.

> and maintaining, but are considered as being covered by the reasonable allowances for salesmanship. The same is true in principle with respect to the salaries of other workers such as yardmen and those who are engaged in the office."

It is manifestly impossible to reconcile on this score the answer with the order. Varying percentages of the total yard work were performed by salesmen of the various agencies. And the same situation prevailed with respect to other workers and other functions. Therefore, the effect of the reworking of these cost tables in the degrees indicated was to render such costs non-representative of the actuality of the respective situations in the different agencies and not only arbitrary but absolutely misleading and deceptive when utilized for comparison with functional costs of other agencies purporting to be applicable to the same function.

The methods used are unexplained. Appellants have been unable even upon the assumption that the propriety of the functional division of costs was destroyed by the elimination of all yarding or office salary expense for salesmen to justify or recognize most of the cost figures appearing in the tables set up in the order. The conclusion is inescapable that many of the figures appearing in these tables arise as a result of the incorporation of unlike ingredients of expense and have been so arranged as to produce a predetermined result to justify the Secretary's ultimate finding expressed in the form of "a reasonable cost" as the mean or norm of these evidentiary findings.

3. Such manipulation of the cost evidence presents a false impression of functional cost variations between individual agencies.

The tables set out above tend to establish that some of the evidentiary fact findings for yarding and office salary costs set up in the order are arrived at by the process of dividing the total of all salary cost items for employees exclusive of salesmen and owners for each firm by the total number of head handled by the particular firm. Of course, such costs are functionally non-representative as to the actual situation in respect of the particular agency if salesmen or owners performed a portion of the yarding as the order finds to have been the case in many but not all instances (F. F. 115, R. 83, 84). Certain unaccountable adjustments have been made in these cost tables unexplainable by appellants because unrevealed by any statement contained in the order or explanation in any evidence either at the hearings before the Secretary or before the court below.[1]

[1]It should be noted that from the very outset of the proceeding before the Secretary the procedure followed served arbitrarily to increase variations in the functional unit costs between agencies. As the Government accountant testified no automobile expense was included in respect of 35 agencies (because unbooked) although included in respect of all the other agencies (R. 822). In the case of 8 agencies no compensation whatsoever was included in the costs for the services of owners actually rendering services during the test year. Such cost was included on the "booked basis" in respect of other agencies (R. 820, 822). More than 60% of the costs considered by the Government accountants was distributed among the species on a judgment basis. As to certain functions one ratio was employed and for unexplainable reasons in other functions a totally different ratio was employed. This situation caused both the Chief Government Accountant (Bachmann) and the Assistant Government Accountant (Burns) to admit on the stand not only lack of

The evidentiary findings expressed by these cost tables in the order constitute the material used to inform the Secretary's judgment as to reasonable cost. Manifestly they are not "normals" of the "actual cost of the particular item" such as are referred to in the *Tagg* case.[1] A judgment so arrived at and predicated upon an unexplained factual background cannot be otherwise than a capricious exercise of authority.

No other evidence in the record lends any support to the Secretary's ultimate findings as to office and yarding salaries. It is a familiar and long-established principle that the want of record evidence to support the order of an administrative body acting in a *quasi* judicial capacity cannot be supplied by evidence extraneous to the record and not presented to the scrutiny of the interested parties. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 93; *Crowell* v. *Benson*, 285 U. S. 22, 48.

---

substantiation for the allocations made (R. 867) but a resultant "lack of uniformity in the results produced" (R. 822). The variations so artificially produced augmented the inevitable cost divergencies in respect of different firms arising from disparity in average size of consignments (Govt. Ex. 114A); of selling value per head in the same classification of the same species; in the income per head arising under the same tariff (R. 865); in the proximity in relative location of selling pens to unloading chutes and scales; in the proportion of buying volume to total volume handled. All these factors caused of necessity very great divergencies in unit costs and when these costs were further distorted in the process of formulation the original errors were greatly magnified.

[1]FF. 14, R. 32 of Tagg Record, No. 45, Oct. Term, 1929.

4. The supposed cost tables comprising the Secretary's evidentiary findings being the whole of the evidence supporting the ultimate findings, and being themselves incompetent, the ultimate findings are void.

The ultimate findings of the Secretary as to reasonable costs for yarding and office salaries are not supported by any evidence other than the Secretary's evidentiary findings. It has been shown that the evidentiary findings are themselves no more than arbitrary and unsupported figures, completely without probative value. It is submitted that it is not open to the court to search the record for possible justifications of the Secretary's ultimate findings or his order. As it was said by Mr. Justice Miller in *United States* v. *Clark*, 96 U. S. 37, 40:

> "* * * when that court has presented, as part of their findings, what they show to be all the testimony on which they base one of the essential, ultimate facts, which they have also found, and on which their judgment rests, we must, if that testimony is not competent evidence of that fact, reverse the judgment for that reason. For here is, in the very findings of the court, made to support its judgment, the evidence that in law that judgment is wrong. And this not on the weight or balance of testimony, nor on any partial view of whether a particular piece of testimony is admissible, but whether, upon the whole of the testimony as presented by the court itself, there is any evidence to support its verdict; that is, its finding of the ultimate fact in question."

POINT VII.

THE ADMINISTRATIVE PROCEEDINGS WERE IRREGULAR, NOT IN CONFORMITY WITH THE STATUTE, AND DENIED APPELLANTS DUE PROCESS.

Considered in its entirety, the procedure followed in the Department of Agriculture in the administrative hearings in determination of this proceeding was irregular, manifestly unfair, and violative of due process. The actual taking of testimony was conducted before an examiner. Appellants specifically requested that the practice followed in the Interstate Commerce Commission be pursued, under which the examiner would make a tentative report, the appellants would be entitled to present exceptions, and the matter might then be argued before the Secretary. This request was denied; no tentative report was at any time filed by the examiner; and no argument upon the evidence taken before the examiner was ever held before the Secretary (R. 4-5).

Following the taking of the evidence before the Examiner at the first hearing, oral argument was had before "Acting" Secretary of Agriculture R. W. Dunlap (R. 28, 5); and following the taking of the evidence before the Examiner at the second hearing, oral argument on the basis of the record made at both hearings was had before "Acting" Secretary of Agriculture Rexford G. Tugwell, and appellants filed a brief in connection therewith (R. 33, 5).

In their petitions in the court below the appellants alleged that at the time of these hearings before Mr. Tugwell and Mr. Dunlap, respectively, the Secretary himself was at his desk in Washington, neither sick, absent nor disabled, and that under these circumstances neither Mr. Dunlap nor Mr. Tugwell could, under the applicable stat-

ute,[1] perform the functions of Acting Secretary either in respect of according the appellants the full hearing required by Section 310 of the Act or of exercising the authority given by that section to the Secretary to prescribe rates. Although the appellants were, on authority,[2] entitled to prove the facts alleged by them as making Mr. Dunlap and Mr. Tugwell, respectively, incompetent to perform the functions of Acting Secretary of Agriculture, the court below, without opinion or statement of any reason, struck this allegation from the petitions, to which appellants duly excepted and in respect to which they have preserved assignments of error (R. 137, 175-176).

The rate order itself is signed by the Secretary of Agriculture in person (R. 130); but in the court below the appellants alleged in their petitions, on information and belief, that, at the time he signed it, the Secretary had not personally heard or read any of the evidence presented at any hearing in connection with this proceeding, had not heard or considered any oral arguments made, or read or considered any briefs submitted by the appellants, and that the sole information upon which he acted was derived from consultation with employees of the Department out of the presence of appellants or any representative of appellants (R. 5). These allegations were stricken from the petitions by the court below, which stated, without citation of authority, that to accept the theory upon which these allegations were made by the appellants would make the statute incap-

---

[1]"In case of the death, resignation, absence, or sickness of the head of a department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section 6 of this title, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease." (Act of July 23, 1868, as amended, 5 U. S. C. A., Sec. 4).

[2]*Ex parte Tsuie Shee*, 218 Fed. 256, 257.

able of practical administration (R. 148). The allegations referred to were therefore disposed of below on the ground that they were immaterial and not upon the ground that they were untrue, and, accordingly, for present purposes, their truth must be assumed just as though they had been disposed of below on demurrer.

The net result of this chain of procedure is this. We have a statute which in express terms requires that the appellants be accorded "full hearing" and which authorizes the Secretary, and no one else, to make a rate order (Sec. 310). We have a general statute which authorizes the First Assistant Secretary to perform the duties imposed upon the Secretary only in case of the death, absence or incapacity of the Secretary himself. In performing his duties under the statute in this case, the Secretary has had the evidence taken by examiners and has never himself heard or read any portion thereof. Whatever report on that evidence was made to him by his examiner was never made public or in any way disclosed to the appellants, although they specifically so requested. Following the taking of the evidence, the oral argument upon that evidence was heard not by the Secretary, but by Assistant Secretaries purporting to be "Acting" Secretaries, but, on the facts alleged in the petitions and which must be taken as having been admitted for purposes of appeal, not competent to act in that regard. Whatever report these functionaries made to the Secretary was never at any time disclosed to the appellants or to any one representing them.

Having in this manner acquired information—the accuracy, scope and completeness of which is undisclosed—the Secretary in person signed the order complained of.

The rule that findings of the Secretary under the present statute, as of administrative bodies generally, in re-

spect of ordinary facts are conclusive upon the Court if supported by "legally sufficient" evidence (*Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 444) is based not alone upon the fact that the administrative body may be regarded as a "tribunal appointed by law and informed by experience", whose judgment in respect of the particular subject matter is entitled to great weight, but also upon the requirement that there shall be no irregularity in the administrative proceedings, that they shall be conducted after full and fair hearing with adequate opportunity for the presentation of evidence either to establish or to negative the existence of facts. This requirement of full hearing, although expressly provided for in the present statute (Sec. 310), is a constitutional prerequisite to the validity of administrative orders in the quasi-judicial field here involved (*Southern Railway* v. *Virginia,* 290 U. S. 190).

Aside from recitals in the order itself—a document whose authorship is undisclosed in the record and unknown to appellants—there is no disclosure whatever by this record as to what information the responsible official charged with the rate-making duty acted upon in making the order in question. Obviously, he cannot have prepared the order himself for that order frequently recites that particular findings are made upon the basis of information contained in the record as a whole, a function which cannot have been performed by the Secretary in view of what must be regarded as the admitted allegations of the petitions of these appellants in the court below that the Secretary had never read, heard or considered the record or any part of it.

While the precise facts in respect to the present procedure appear to be unprecedented, the principle is not new. With respect to the required administrative procedure under the Interstate Commerce Act, which, as we have shown, is

in *pari materia* with the present act (p. 84, *ante*), this Court has thus answered the contention that the administrative order might be supported by facts in the Commission's files or otherwise known to it but not made of record and subjected to scrutiny and contest:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, *and at the same time imposed the duty of deciding in accordance with the facts proved.* A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.'" [Emphasis ours.]
>
> *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91.

The appellants' point is no mere technicality. They do not question the right or the practical necessity in the administration of statutes that the responsible head of the Depart-

ment shall have the full assistance of his subordinates in gathering evidence and in performing whatever other functions may assist him in reaching his conclusions. But under the doctrine of the *Louisville & Nashville* case, *supra*—a doctrine repeated in *Crowell* v. *Benson*, 285 U. S. 22, 56-57—any evidence gathered by his subordinates upon which the Secretary in any way bases his conclusion must be spread of record and subjected to scrutiny and to contest by the appellants. That has not been done in this case, for, on the uncontroverted allegations of the petitions, the Secretary decided this case not on the basis of the record and not on the basis of the evidence, not on the basis of the briefs or the argument—for he never heard, read or considered any of them—but upon the basis of reports made to the Secretary by his subordinates out of the presence of the appellants. What evidence was thus presented to the Secretary is unknown and, under the doctrine of the *Louisville & Nashville* case and *Crowell* v. *Benson*, cannot support the order.

This is not a case where the Secretary has attempted to redelegate to his assistant the duty of deciding the whole controversy and performing his rate-making function under the statute. If it were such a case, the question would be as to the power to delegate, and as to the regularity of the appointment of the assistant and of the existence of the facts conditioning his status as Acting Secretary. Here, however, the Secretary purports himself to exercise the rate-making function. The statute imposed upon him the duty of exercising that function "in accordance with the facts proved" (*Illinois Central* case, *supra*). Yet, the Government and the court below have regarded as immaterial the considered allegations of the appellants that the

Secretary did not make that decision in accordance with the facts proved; that, on the contrary, he at no time heard, read or considered the facts proved; but that he made that decision upon the basis of reports to him by his subordinates; of the nature, character and scope of which the appellants were uninformed at the time and remain uninformed.

Neither the length of the administrative proceedings, the volume of the testimony adduced thereat, nor the length nor complexity of the report which bears the Secretary's signature, can alter the essential basic fact that the petitions in equity in this case allege—and that is not denied, but, on the contrary, is treated as immaterial—that the responsible official charged with the duty of making just and reasonable rates and who, in fact, purports to exercise that function by the order under review, at no time heard or read any of the evidence whatever, at no time heard or considered any argument whatever, and at no time read or considered any brief submitted by any of these appellants. If this is consistent with the statutory and constitutional requirements for administrative action of a quasi-judicial character, then there is no purpose to be served in any longer requiring a hearing at all, for if the Secretary may act solely upon the basis of secret reports from his subordinates, those reports could just as well be compiled from a secret interdepartmental investigation as from the result of a public hearing.

The administrative procedure followed in these cases, despite the large record and the lengthy "findings," has in fact resulted, for the reasons stated, in the making of an order at the arbitrary will of one man. The language of this Court in its recent opinion in *Jones* v. *Securities and Exchange Commission* (decided April 6, 1936, p. 12), is in point:

"The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws, because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. * * *

"Arbitrary power and the rule of the Constitution cannot both exist.* * * if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

CONCLUSION

It is submitted that the decree dismissing the bills of your petitioners should be reversed, and that the causes should be remanded to the court below with directions to grant the relief as prayed in the bills.

Respectfully submitted,

FREDERICK H. WOOD,
JOHN B. GAGE,
Counsel for Appellants.